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AUSPICIOUS JOURNEY SDN BHD v. EBONY RITZ SDN BHD & ORS

FEDERAL COURT, PUTRAJAYA
AZAHAR MOHAMED CJ (MALAYA)
NALLINI PATHMANATHAN FCJ
B ABDUL RAHMAN SEBLI FCJ
ZALEHA YUSOF FCJ
ZABARIAH MOHD YUSOF FCJ
[CIVIL APPEAL NO: 02(f)-53-06-2019(W)]
9 MARCH 2021

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COMPANY LAW: *Oppression – Minority shareholder – Protection against oppressive or detrimental conduct of majority shareholders – Companies Act 1965, s. 181 (Companies Act 2016, s. 346) – Whether directors or third parties may be made liable in proceedings under s. 181 – Intention of Legislature – Whether court*
D *has wide powers in remedying minority grievance – Legal test – Whether so connected to oppressive, detrimental or prejudicial conduct that it would be fair and just to impose liability for such conduct*

COMPANY LAW: *Directors – Liabilities – Joinder of directors and third parties as respondents in oppression petition– Liability against minority shareholders –*
E *Whether directors privy to wrongdoings perpetrated at company level – Whether fell within ambit of s. 181 of Companies Act 1965 (s. 346 of Companies Act 2016) – Whether so connected to unfairly prejudicial conduct that it would be fair to grant remedy for such conduct – Whether requires deliberate involvement to warrant imposition of liability on directors and third parties*

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STATUTORY INTERPRETATION: *Construction of statutes – Intention of Parliament – Companies Act 1965, s. 181 (Companies Act 2016, s. 346) – Protection against oppressive or detrimental conduct of majority shareholders – Whether accorded wide and broad remedy to bring oppressive conduct to end or remedying it – Whether to arrest inadequacies of common law*

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Auspicious Journey Sdn Bhd ('Auspicious Journey') and Hoe Leong Corporation Ltd ('Hoe Leong') entered into a joint venture and formed a joint venture company, Ebony Ritz, specifically to undertake the acquisition of 49% shares in a company known as Semua International Sdn Bhd ('Semua International') which had been involved in the tanker chartering business for
H over 20 years. Under the joint venture, Auspicious Journey was the minority shareholder in Ebony Ritz, holding 20% of the shares, while Hoe Leong was the majority shareholder, holding 80% of the shares. Ebony Ritz appointed three directors and Auspicious Journey nominated one director, Andy Kuek while Hoe Leong nominated two directors, namely Paul Kuah and James
I Kuah ('Kuah brothers'), who were also the directors of Ebony Ritz. Prior to its acquisition, Semua International was a wholly-owned subsidiary of Sumatec Resources Bhd ('Sumatec'), an entity with shares listed and quoted

on Bursa. Ebony Ritz entered into a sale and purchase agreement dated 5 May 2010 with Sumatec to purchase 49% of Sumatec's shares in Semua International for RM44.1 million. After such acquisition, the proportion of shareholding in Semua International would be 49:51 in favour of Ebony Ritz and Sumatec, respectively. Hoe Leong contributed 80% of the purchase price while Auspicious Journey contributed 20%. On the same date, an Options and Financial Representation Agreement ('OFRA') was entered into between Ebony Ritz, Sumatec and Auspicious Journey granting certain rights and entitlements to Ebony Ritz and Auspicious Journey and, Ebony Ritz, Sumatec and Semua International entered into a shareholders' agreement for the purpose of regulating their relationship as shareholders of Semua International as well as the conduct of the affairs of Semua International. Additionally, Ebony Ritz and Semua International entered into a loan agreement, pursuant to which an interest free term loan facility of RM10 million was granted by Ebony Ritz to Semua International to be utilised by Semua International towards its working capital requirements in relation to its oil tanker chartering business. This was funded by the shareholders of Ebony Ritz in proportion to their respective shareholding. There were several contractual expectations envisaged *vis-à-vis* Ebony Ritz and Sumatec in relation to the oil charter tankering business of Semua International. However, these contractual expectations were not met. There was a profit shortfall for the financial year 2012 and, accordingly, *vide* a letter of 4 September 2012, Ebony Ritz gave notice to Sumatec as to the profit shortfall and required Sumatec to make good the same in the sum of approximately RM27 million under the OFRA. Sumatec was unable to make good this sum and also failed to comply with its obligations under the OFRA. On 21 December 2012, unknown to Auspicious Journey, Hoe Leong had entered into a conditional sale and purchase agreement with Setinggi Holdings, Ebony Ritz and Sumatec for the disposal of the entire retained 51% equity interest of Sumatec in Semua International ('conditional SPA'). This was to allow for a structure in the form of a warehousing arrangement with a view to enabling Hoe Leong to take control of the oil tanker chartering business. The effect of the conditional SPA was that 2% was to be purchased by Hoe Leong for RM1.8 million and 49% was to be purchased by Setinggi for RM17 million. This would mean that the entire retained 51% would be held by Hoe Leong as Setinggi was, in effect, its nominee.

Hence, Auspicious Journey, as a minority shareholder, filed the present originating summons against the defendants, contending that the 51% SPA had expropriated its rights as well as Ebony Ritz's rights under the OFRA. The latter had affected Auspicious Journey's rights as a minority shareholder. Auspicious Journey maintained that its claim fell within the ambit of s. 181 of the Companies Act 1965 ('CA 1965') (now s. 346 of the Companies Act 2016 ('CA 2016')) by reason of the conditional SPA which demonstrated that Hoe Leong had utilised its majority powers to cause Ebony Ritz to enter into the conditional SPA, for its own benefit (through

its nominee Hoe Leong), to the ultimate detriment of Auspicious Journey as a minority shareholder of Ebony Ritz. Hoe Leong contended that Auspicious Journey brought this action to recover its investment in Semua International, by, *inter alia*, having its 20% shareholding in Ebony Ritz bought over by Hoe Leong. The High Court found that liability under s. 181 of the CA 1965 was established against the majority shareholder alone and dismissed the claim against the other defendants, who were directors and third parties. The Court of Appeal upheld the findings of the High Court. The basis for the refusal to extend liability to the directors, in essence, was that a director is an agent of a company and could not therefore be personally liable for the breaches or acts of the company, even in an oppression claim under s. 181 of the CA 1965. The appellant thus obtained leave to appeal on the following questions of law: (i) whether the principle in *Abdul Manaf Mohd Ghows & Ors v. Nusantara Timur Sdn Bhd & Ors,* that a director is an agent of a company and is thereby not personally liable for the breaches or the acts of the company, applies to proceedings under s. 181 of the CA 1965 where the shareholder is itself a company and the acts of oppression and unfair dealings are derived from the mind and acts of the principal directors ('question 1'); (ii) whether a director and/or directors of a subject company who are privy to the wrongdoings perpetrated and/or undertaken at the subject company level, and such wrongdoings have been found to be within the ambit of s. 181 of the CA 1965 may be visited with liability pursuant to the said s. 181 ('question 2'); (iii) if in the affirmative, the circumstances in which such a director or directors may be visited with liability ('question 2.1'); (iv) whether a third party and/or third parties, who are neither a director or a shareholder of a subject company in which proceedings are brought pursuant to s. 181 may be visited with liability, whether jointly and/or severally, for acts within the ambit of the said s. 181 ('question 3'); (v) if in the affirmative, the circumstances in which such third party and/or third parties may be visited with liability ('question 3.1').

Held (dismissing appeal)

Per Nallini Pathmanathan FCJ delivering the judgment of the court:

(1) The two corporate law principles of majority rule and the separate legal personality, coupled with judicial non-interference, resulted in minority shareholders having very little recourse against acts of the majority which were oppressive or detrimental to the minority in their capacity as shareholders. Section 181 of the CA 1965 was enacted to afford minority protection where majority rule has been abused. In the present fact, the member or shareholder in issue was Auspicious Journey and the company in issue was Ebony Ritz. The majority shareholder was Hoe Leong and the directors mentioned in the section refer to the directors of Ebony Ritz, namely, the Kuah brothers. Section 181 does

not make reference to the Kuah brothers in their capacity as directors of Hoe Leong. The function of the Kuah brothers as directors of Ebony Ritz must not be conflated with their function and capacity as directors of Hoe Leong. (paras 68, 71 & 74)

(2) Limb (a) of s. 181 envisages oppressive conduct as being established where either the 'affairs of the company are being conducted' or where the 'powers of the directors are being exercised in a manner oppressive ...'. When limb (a), which expressly identifies the directors' exercise of powers as a basis for establishing oppression, is read with s. 181(2) which gives the court very wide powers to bring such conduct to an end, or to remedying the minorities' grievance, it follows that there is no prohibition against the court granting a remedy which encompasses the directors of the company personally. On the contrary, a construction of s. 181(1)(a) and (2) reveals that the intention of the Legislature is to allow the court the freedom to fashion a remedy it thought fit, which would encompass liability devolving on a director directly in circumstances where the director exercised his powers to: (i) oppress the minority shareholders; or (ii) disregard their interests as members. Further, a reading of limb (a) of s. 181(1) refers expressly to the 'conduct of the affairs of the company', which is a matter which falls within the management duties and powers of the directors (paras 77-79)

(3) Limb (a) therefore focuses on the acts of the directors expressly in the conduct of the affairs of the subject company, *ie*, the acts of the Kuah brothers in conducting the affairs of Ebony Ritz and materially, its effect on the minority shareholder, Auspicious Journey. The acts conducted by the Kuah brothers on behalf of Ebony Ritz had an oppressive effect on Auspicious Journey in its capacity as a shareholder. Whereas, limb (b) of s. 181 refers to an act of the company itself, or a resolution of the members, which unfairly discriminates against or is otherwise prejudicial to one or more of the members. (paras 79 & 80)

(4) While the company is a separate legal entity, it comprises of two distinct organs, *ie*, the Board of Directors and the members/shareholders respectively. Section 181 therefore targets conduct or acts of the company at both the directors and shareholders' levels. It is necessary to construe s. 181 as it reads. The judicial construction must accord the provision the intention Parliament sought fit to enact, namely, a wide and broad remedy encompassing, not only the majority or the company, but also the directors and third parties where necessary, with a view to bringing the oppressive or prejudicial conduct to an end or remedying it. Hence, it is a remedial provision to arrest the mischief of the inadequacies of the common law in protecting the interests of the minority shareholders. (paras 84 & 85)

(5) There is nothing in s. 181 of the CA 1965 specifically saying that only members of the company, its directors, or those in control of the company may be made respondents. All alleged oppressors are proper parties, including third parties who participated in the transactions forming the substratum of the complaint and parties who are affected by the relief sought. It is open to the courts to impose liability against directors or third parties provided there is a sufficiently close nexus between the oppressive or unfairly discriminatory conduct, or disregard of the minority's interests or otherwise prejudicial conduct and that party. It requires something more than the mere fact of their being directors who had conduct of the affairs of the company at the material time. It requires deliberate involvement in the impugned transactions, or a sufficiently close nexus, participation or connection to warrant the imposition of liability to directors or third parties. (paras 100 & 126)

(6) The legal tests applicable are: (i) there should be evidence of deliberate involvement or participation in, or a sufficiently close nexus to, the oppressive or detrimental or prejudicial conduct that the minority complains of, to warrant the attribution of liability to a director or a third party; (ii) the imposition of liability should be fair or just in all the circumstances of the particular case; (iii) in assessing whether the imposition of such liability is fair or just, the court should be satisfied that the remedy results in fairness to the parties concerned as a whole; (iv) the attribution or imposition of liability should be circumspect, going no further than is necessary to remedy the breach complained of or to stop the oppressive or prejudicial conduct; (v) such imposition of liability must be reasonable, and serve to alleviate the legitimate concerns of the shareholders of the company in question; and (vi) in exercising its powers under s. 181 of the CA 1965, the court should bear in mind the general corporate law principles, such that the director liability does not become a substitute for other statutory relief or under the common law. In summary, the question for the court is whether, in the context of s. 181 of the CA 1965, the defendant was so connected to the oppressive, detrimental or prejudicial conduct that it would be fair and just to impose liability against him for such conduct. (para 128)

(7) In the circumstances, question 1 was answered in the negative and questions 2 and 3 were answered in the affirmative. As for questions 2.1 and 3.1, it was ultimately dependent on the circumstances of a particular case. (para 137)

(8) The imposition of personal liability of the directors and/or third parties must be fair and just in accordance with the facts and circumstances of the case. The High Court Judge made clear findings of oppression on the part of the majority shareholder through the acts of the directors of Ebony Ritz namely the Kuah brothers. The acts of the majority

shareholder and its nominated directors in Ebony Ritz were, among others, directed towards a salvage and warehousing situation as Auspicious Journey did not wish to expend further monies to effect such salvage of Ebony Ritz's investment. While the acts themselves and the manner in which they were carried out may be categorised as prejudicial and detrimental to the minority shareholder, Auspicious Journey, it remained an inexorable reality that the conduct was ultimately related to salvaging Ebony Ritz. This weighed in favour of a non-attribution of liability as the court was bound to consider what is 'fair and just' in all the circumstances of the case. As such, the preponderance of factors militated against holding the Kuah brothers, *a fortiori* Teh, a director of Setinggi, personally liable for their oppressive conduct. (paras 140-142)

(9) This court was not restricted to the reliefs mentioned in s. 181(2) but was empowered to grant an open-ended range of remedies. This discretion includes the discretion to refuse reliefs which the court feels inappropriate on the facts of the case. Auspicious Journey, in asking for a buy-out of its shareholding in Ebony Ritz, appeared to seek to escape from a bad bargain or to recoup its investment in the joint-venture with Hoe Leong. Even though a buy-out may well be the most practical and efficacious solution in many cases of oppression, this does not mean that winding up is effectively precluded or the remedy of the very last resort. On the consideration of the totality of the facts, the remedy of a buy-out was not the most appropriate remedy. Hence, the courts below did not err in awarding the remedy of winding up, rather than a buy-out in favour of Auspicious Journey. (paras 148, 153, 157, 158 & 163)

Bahasa Melayu *Headnotes*

Auspicious Journey Sdn Bhd ('Auspicious Journey') dan Hoe Leong Corporation Ltd ('Hoe Leong') memasuki satu usaha sama dan membentuk satu syarikat usaha sama, Ebony Ritz, khususnya untuk membuat pengambilan 49% saham dalam syarikat yang dikenali sebagai Semua International Sdn Bhd ('Semua International') yang terlibat dalam perniagaan carter tangki minyak selama lebih 20 tahun. Bawah usaha sama tersebut Auspicious Journey adalah pemegang saham minoriti dalam Ebony Ritz, memegang 20% saham dan Hoe Leong adalah pemegang saham majoriti, memegang 80% saham. Ebony Ritz melantik tiga pengarah iaitu, Paul Kuah dan James Kuah ('bersaudara Kuah'). Sebelum pengambilannya, Semua International adalah anak syarikat milik penuh Sumatec Resources Bhd ('Sumatec'), satu entiti dengan saham tersenarai dan disebutharga dalam Bursa. Ebony Ritz memasuki satu perjanjian jual beli bertarikh 5 Mei 2010 dengan Sumatec untuk membeli 49% saham Sumatec dalam Semua International untuk RM44.1 juta. Selepas pengambilan itu, bahagian pegangan saham dalam Semua International akan menjadi 49:51 berpihak, masing-masing, pada Ebony Ritz dan Sumatec. Hoe Leong menyumbang

A 80% harga belian, manakala, Auspicious Journey menyumbang 20%. Pada tarikh sama, satu perjanjian, Options and Financial Representation Agreement ('OFRA') dimasuki antara Ebony Ritz, Sumatec dan Auspicious Journey dan, Ebony Ritz, Sumatec dan Semua International memasuki perjanjian pemegang saham untuk mengawal hubungan mereka sebagai
B pemegang-pemegang saham Semua International serta penjalanan urusan Semua International. Tambahan lagi, Ebony Ritz dan Semua International memasuki satu perjanjian pinjaman, yang menurutnya satu kemudahan pinjaman tanpa faedah sejumlah RM10 juta diberi oleh Ebony Ritz kepada Semua International untuk digunakan oleh Semua International untuk
C keperluan modal kerja berkaitan dengan perniagaan carter tangki minyaknya. Ini dibiaya oleh pemegang-pemegang saham Ebony Ritz menurut bahagian pegangan saham masing-masing. Terdapat beberapa harapan kontrak yang digambarkan *vis-à-vis* Ebony Ritz dan Sumatec berkaitan dengan perniagaan carter tangki minyak Semua International. Walau bagaimanapun, jangkaan kontrak tidak dipenuhi. Terdapat kurangan keuntungan untuk tahun
D kewangan 2012 dan, oleh itu, melalui surat bertarikh 4 September 2012, Ebony Ritz memberi notis kepada Sumatec mengenai kurangan keuntungan itu dan meminta Sumatec memulihkannya dalam jumlah lebih kurang RM27 juta bawah OFRA. Sumatec tidak mampu memulihkan jumlah ini dan juga gagal memenuhi kewajipannya bawah OFRA. Pada 21 Disember 2012, tanpa
E pengetahuan Auspicious Journey, Hoe Leong memasuki perjanjian jual beli bersyarat dengan Setinggi Holdings, Ebony Ritz dan Sumatec untuk pelupusan keseluruhan 51% kepentingan ekuiti yang dipegang Sumatec dalam Semua International ('PJB bersyarat'). Ini demi membenarkan satu struktur dalam bentuk pengurusan penggudangan dengan niat membolehkan
F Hoe Leong mengambil kawalan perniagaan carter tangki minyak. Kesan PJB bersyarat adalah 2% dibeli oleh Hoe Leong pada jumlah RM1.8 juta dan 49% dibeli oleh Setinggi pada jumlah RM17 juta. Ini bermaksud bahawa keseluruhan 51% yang dikekalkan akan dipegang oleh Hoe Leong kerana Setinggi sebenarnya adalah penamanya.

G Oleh itu, Auspicious Journey, sebagai pemegang saham minoriti, memfailkan saman pemula ini terhadap defendan-defendan, menghujahkan bahawa 51% PJB mengekspropriasi haknya dan juga hak Ebony Ritz bawah OFRA. Yang terkemudian juga menjejaskan hak Auspicious Journey sebagai pemegang saham minoriti. Auspicious Journey mengekalkan bahawa
H tuntutannya terangkum bawah s. 181 Akta Syarikat 1965 ('Akta 1965') (sekarang s. 346 Akta Syarikat 2016 ('AS 2016')) disebabkan PJB bersyarat yang menunjukkan bahawa Hoe Leong menggunakan kuasa majoritinya untuk menyebabkan Ebony Ritz memasuki PJB bersyarat, untuk faedahnya sendiri (melalui penamanya Hoe Leong), sehingga menjejaskan dengan teruk
I Auspicious Journey sebagai pemegang saham minoriti Ebony Ritz. Hoe Leong menghujahkan bahawa Auspicious Journey memulakan tindakan ini untuk mendapatkan semula pelaburannya dalam Semua International dengan, antara lain, menyebabkan pegangan 20% sahamnya dalam Ebony

Ritz dibeli oleh Hoe Leong. Mahkamah Tinggi mendapati liabiliti bawah s. 181 Akta 1965 dibuktikan terhadap pemegang saham majoriti sahaja dan menolak tuntutan terhadap defendan-defendan lain, yang adalah pengarah-pengarah dan pihak ketiga. Mahkamah Rayuan mengesahkan dapatan-dapatan Mahkamah Tinggi. Asas penolakan lanjutan liabiliti terhadap pengarah-pengarah, secara inti patinya, kerana pengarah adalah ejen satu-satu syarikat dan oleh itu, tidak boleh bertanggungan secara peribadi terhadap pelanggaran atau tindakan syarikat, walaupun dalam tuntutan penindasan bawah s. 181 Akta 1965. Perayu, oleh itu, memperoleh kebenaran untuk merayu atas soalan-soalan undang-undang berikut: (i) sama ada prinsip dalam kes *Abdul Manaf Mohd Ghows & Ors v. Nusantara Timur Sdn Bhd & Ors* bahawa seorang pengarah adalah ejen syarikat dan, dengan itu, tidak bertanggungan secara peribadi atas pelanggaran atau tindakan-tindakan syarikat terpakai dalam prosiding bawah s. 181 Akta 1965 apabila pemegang saham tersebut itu sendiri adalah syarikat dan tindakan-tindakan penindasan dan urusan tidak adil terbit daripada minda dan tindakan-tindakan pengarah utama ('soalan 1'); (ii) sama ada seorang pengarah dan/atau pengarah-pengarah syarikat tersebut yang adalah privi pada salah laku yang dilakukan dan/atau diambil di peringkat syarikat tersebut didapati terangkum dalam ruang lingkup s. 181 Akta 1965 boleh dikenakan liabiliti menurut s. 181 tersebut ('soalan 2'); (iii) jika dalam afirmatif, keadaan yang dalamnya pengarah atau pengarah-pengarah tersebut boleh dikenakan liabiliti ('soalan 2.1'); (iv) sama ada pihak ketiga dan/atau pihak-pihak ketiga, yang bukan pengarah atau pemegang saham syarikat tersebut yang terhadapnya prosiding dimulakan menurut s. 181 boleh dikenakan liabiliti, sama ada secara bersesama dan/atau berasingan, untuk tindakan-tindakan dalam ruang lingkup s. 181 ('soalan 3'); dan (v) jika dalam afirmatif, keadaan apabila pihak ketiga dan/atau pihak-pihak ketiga boleh dikenakan liabiliti.

Diputuskan (menolak rayuan)

Oleh Nallini Pathmanathan HMP menyampaikan penghakiman mahkamah:

(1) Dua prinsip undang-undang syarikat berkaitan kawalan majoriti dan personaliti undang-undang berasingan, ditambah dengan tidak campur tangan kehakiman, mengakibatkan pemegang-pemegang saham minoriti mempunyai hanya sedikit bantuan terhadap tindakan-tindakan majoriti yang menindas atau memudaratkan minoriti dalam kapasiti mereka sebagai pemegang-pemegang saham. Seksyen 181 Akta 1965 digubal untuk memberi perlindungan pada minoriti apabila peraturan majoriti disalah guna. Dalam fakta kes ini, ahli-ahli atau pemegang saham yang terlibat adalah Auspicious Journey dan syarikat yang terlibat adalah Ebony Ritz. Pemegang saham majoriti adalah Hoe Leong dan pengarah-pengarah yang disebut dalam seksyen tersebut merujuk pada pengarah-pengarah Ebony Ritz, iaitu, Kuah bersaudara. Seksyen 181 tidak merujuk pada Kuah bersaudara dalam kapasiti mereka sebagai pengarah-

pengarah Hoe Leong. Fungsi Kuah bersaudara sebagai pengarah-pengarah Ebony Ritz tidak boleh digabungkan dengan fungsi dan kapasiti mereka sebagai pengarah-pengarah Hoe Leong.

(2) Bahagian (a) s. 181 membayangkan tindakan menindas dibuktikan apabila 'hal-ehwal syarikat dikendalikan' atau apabila 'kuasa pengarah adalah dijalankan dengan cara yang menindas …'. Apabila bahagian (a), yang secara langsung mengenal pasti pelaksanaan kuasa-kuasa pengarah sebagai asas pembuktian penindasan, dibaca bersama-sama dengan s. 181(2) yang memberi mahkamah kuasa luas untuk menamatkan tindakan sedemikian, atau untuk meremedi kilanan minoriti, diikuti bahawa tiada larangan terhadap mahkamah memberi remedi yang termasuk pengarah-pengarah syarikat secara peribadi. Sebaliknya, pentafsiran s. 181(1)(a) dan (2) mendedahkan bahawa niat Perundangan adalah untuk memberikan mahkamah kebebasan untuk memberi remedi yang dianggap sesuai, yang termasuk liabiliti yang diturunkan atas pengarah secara langsung dalam keadaan apabila pengarah melaksanakan kuasa-kuasanya untuk: (i) menindas pemegang saham minoriti; atau (ii) tidak mengendahkan kepentingan mereka sebagai ahli-ahli. Selanjutnya, membaca bahagian (a) s. 181 rujukan dibuat secara langsung pada 'pengendalian hal-ehwal syarikat', satu perkara yang terangkum dalam tanggungjawab dan kuasa pentadbiran pengarah-pengarah.

(3) Bahagian (a) oleh itu, tertumpu pada tindakan pengarah-pengarah secara langsung dalam pengendalian hal-ehwal syarikat tersebut, iaitu, tindakan-tindakan Kuah bersaudara apabila melaksanakan hal-ehwal Ebony Ritz dan secara pentingnya, kesannya terhadap pemegang saham minoriti, Auspicious Journey. Tindakan-tindakan yang dilakukan oleh Kuah bersaudara bagi pihak Ebony Ritz mempunyai kesan menindas terhadap Auspicious Journey dalam kapasitinya sebagai pemegang saham. Manakala, bahagian (b) s. 181 merujuk pada tindakan syarikat itu sendiri atau resolusi ahli-ahli, yang mendiskriminasi secara tidak adil terhadap atau sebaliknya memprejudis satu atau lebih daripada ahli-ahlinya.

(4) Sementara syarikat adalah entiti undang-undang berasingan, ini termasuk dua organ, iaitu, masing-masingnya, lembaga pengarah dan ahli-ahli/pemegang saham. Seksyen 181 oleh itu menumpukan tindakan syarikat terhadap kedua-dua peringkat pengarah dan pemegang saham. Seksyen 181 ditafsir secara harfiah. Peruntukan tersebut perlu diberi pentafsiran kehakiman yang dianggap sesuai seperti yang digubal Parlimen, iaitu, satu remedi yang luas dan lebar yang termasuk, bukan hanya majoriti atau syarikat tersebut, malah juga, pengarah-pengarah dan pihak ketiga apabila perlu, dengan niat untuk menamatkan atau meremedi tindakan menindas atau memprejudis. Oleh itu, ini adalah

peruntukan meremedi untuk menyelesaikan masalah ketidakcukupan perlindungan common law terhadap kepentingan pemegang-pemegang saham minoriti.

(5) Tiada apa-apa dalam s. 181 Akta 1965 yang khususnya menyatakan hanya ahli-ahli syarikat, pengarah-pengarahnya, atau sesiapa yang mempunyai kawalan syarikat boleh dijadikan responden. Kesemua yang dikatakan penindas adalah pihak yang wajar, termasuk pihak ketiga yang mengambil bahagian dalam transaksi yang membentuk substratum aduan dan pihak-pihak yang terjejas oleh relief yang dipohon. Terbuka buat mahkamah mengenakan liabiliti terhadap pengarah-pengarah atau pihak ketiga asalkan terdapat kaitan rapat antara penindas atau tindakan diskriminasi tidak adil, atau tidak mengendahkan kepentingan minoriti atau sebaliknya tindakan memprejudis dan pihak tersebut. Ini memerlukan sesuatu yang lebih daripada hanya fakta bahawa mereka sebagai pengarah-pengarah yang mengendalikan hal-ehwal syarikat pada masa material. Ini memerlukan penglibatan langsung dengan transaksi yang dipersoalkan, atau kaitan rapat yang mencukupi atau kaitan untuk mewajarkan pengenaan liabiliti terhadap pengarah-pengarah atau pihak ketiga.

(6) Ujian undang-undang yang terpakai adalah: (i) perlu ada keterangan tentang kaitan langsung atau penglibatan dalam, atau kaitan rapat yang mencukupi dengan, tindakan menindas atau memudaratkan atau memprejudis yang diadukan oleh minoriti, untuk mewajarkan penyebaban liabiliti terhadap pengarah atau pihak ketiga; (ii) pengenaan liabiliti sepatutnya adil atau saksama dalam semua hal keadaan sesuatu kes; (iii) apabila menilai sama ada pengenaan liabiliti sedemikian adalah adil atau saksama, mahkamah sepatutnya berpuas hati bahawa remedi tersebut menyebabkan keadilan pada pihak-pihak yang terkesan secara keseluruhannya; (iv) penyebaban atau pengenaan liabiliti perlu dengan berhati-hati, tidak melampaui apa yang sepatutnya untuk meremedi pelanggaran yang diadukan atau menghentikan tindakan menindas atau prejudis; (v) pengenaan liabiliti yang sedemikian sepatutnya munasabah, dan bertindak mengurangkan kebimbangan sah pemegang-pemegang saham syarikat yang dipersoalkan; dan (vi) apabila melaksanakan kuasa bawah s. 181 Akta 1965, mahkamah wajar mempertimbangkan prinsip undang-undang am syarikat, bahawa liabiliti pengarah tidak digantikan dengan relief statutori yang lain atau bawah common law. Kesimpulannya, soalan untuk mahkamah adalah sama ada dalam konteks s. 181 Akta 1965, defendan terkait secara rapat dengan tindakan penindasan, kemudaratan atau prejudis dan adalah adil dan saksama untuk mengenakan liabiliti terhadapnya untuk tindakan sedemikian.

(7) Dalam keadaan tersebut, soalan 1 dijawab secara negatif dan soalan-soalan 2 dan 3 dijawab secara afirmatif. Untuk soalan 2.1 dan 3.1, itu bergantung pada hal keadaan satu-satu kes.

(8) Pengenaan liabiliti peribadi terhadap pengarah-pengarah dan/atau pihak ketiga perlu adil dan saksama menurut fakta dan keadaan kes. Hakim Mahkamah Tinggi membuat dapatan jelas penindasan pada pihak majoriti pemegang saham melalui tindakan-tindakan pengarah-pengarah Ebony Ritz, iaitu Kuah bersaudara. Tindakan pemegang-pemegang saham majoriti dan pengarah-pengarah yang dinamakan dalam Ebony Ritz adalah, antara lain, terarah untuk menyelamatkan dan penggudangan kerana Auspicious Journey tidak mahu membelanjakan lagi wang untuk menyelamatkan pelaburan Ebony Ritz. Walaupun tindakan itu sendiri dan cara perkara tersebut dilakukan boleh dikategorikan sebagai memprejudis dan memudaratkan pemegang saham minoriti, Auspicious Journey, itu kekal sebagai realiti yang tidak dapat disangkal bahawa tindakan tersebut pada akhirnya adalah untuk menyelamatkan Ebony Ritz. Ini lebih berpihak untuk tidak mengenakan liabiliti kerana mahkamah terikat untuk mempertimbangkan apa yang 'adil dan saksama' dalam kesemua keadaan kes. Oleh itu, terdapat lebih faktor yang menghalang daripada memutuskan Kuah bersaudara, *a fortiori*, Teh, pengarah Setinggi, bertanggungan secara peribadi terhadap tindakan menindas.

(9) Mahkamah ini tidak terhalang dengan relief-relief yang dinyatakan dalam s. 181(2) tetapi diberi kuasa memberi remedi-remedi tanpa batasan. Budi bicara ini termasuk budi bicara untuk menolak relief-relief yang mahkamah anggap tidak wajar atas fakta kes. Auspicious Journey, apabila memohon pembelian habis pegangan sahamnya dalam Ebony Ritz, mencuba untuk mengelak daripada kerugian atau mendapatkan semula pelaburannya dalam usaha sama dengan Hoe Leong. Walaupun, pembelian habis mungkin adalah penyelesaian dalam kebanyakan kes penindasan, ini tidak bermaksud bahawa penggulungan secara efektifnya dihalang atau adalah remedi terakhir. Atas pertimbangan keseluruhan fakta, remedi pembelian habis bukan remedi yang paling wajar. Oleh itu, mahkamah-mahkamah bawahan tidak khilaf apabila mengawardkan remedi penggulungan, dan bukan pembelian habis berpihak pada Auspicious Journey.

Case(s) referred to:

Abdul Manaf Mohd Ghows & Ors v. Nusantara Timur Sdn Bhd [1997] 4 CLJ 437 CA ***(refd)***

Antoniades v. Wong & Ors [1997] 2 BCLC 419 ***(refd)***

Barthelemy and Another v. F & C Alternative Investments (Holdings) Ltd and Others (No 2) [2012] Ch 613 ***(refd)***

BCE Inc v. 1976 Debentureholders [2008] 3 SCR 560 ***(refd)***

Budd v. Gentra [1998] OJ No. 3109 ***(refd)***

Cumberland Holdings Ltd v. Washington H Soul Pattinson & Co Ltd (1977) 2 ACLR 307 ***(refd)***

F&C Alternative Investments (Holdings) Ltd v. Barthelemy & Ors [2011] EWHC 1731 ***(refd)***

Ferguson and Imax Systems Corp [1983] OJ No 3156 ***(refd)***
Foo Ban Nyen v. Foo Yet Kai & Sons Sdn Bhd & Ors [1991] 2 CLJ 1364; [1991] 2 CLJ (Rep) 612 HC ***(refd)***
Foss v. Harbottle (1843) 2 Hare 461 ***(refd)***
Gee Hoe Chan Trading Co Pte Ltd, Re [1992] 1 CLJ 268; [1992] 4 CLJ (Rep) 383 HC ***(refd)***
Ho Yew Kong v. Sakae Holdings Ltd and Other Appeals and Other Matters [2018] SGCA 33 ***(refd)***
Imperial Oil Ltd v. C & G Holdings Ltd [1990] 62 DLR (4th 261) ***(refd)***
In re Dinglis Properties Ltd v. Dinglis and Others [2019] EWHC 1664 ***(refd)***
Jet-Tech Materials Sdn Bhd & Anor v. Yushiro Chemical Industry Co Ltd & Ors And Another Appeal [2013] 2 CLJ 277 FC ***(refd)***
Johnson v. Gore-Wood & Co [2002] 2 AC 1 ***(refd)***
Kejutan Holdings Sdn Bhd v. Magnum 4D (Perak) Sdn Bhd & Ors [2005] 2 CLJ 766 HC ***(refd)***
Koh Jui Hiong & Ors v. Ki Tak Sang & Another Appeal [2014] 2 CLJ 401 FC ***(refd)***
Kuah Kok Kim v. Chong Lee Leong Co (Pte) Ltd [1991] 1 SLR(R) 795 ***(refd)***
Kumagai Gumi Co Ltd v. Zenecon Pte Ltd [1995] 2 SLR(R) 304 ***(refd)***
Leon Van Neck and Son Ltd v. McGorman [1998] OJ No 4813 ***(dist)***
Lim Swee Khiang v. Borden Co (Pte) Ltd [2006] 4 SLR(R) 745 ***(refd)***
Looh Siong Chee v. Numix Engineering Sdn Bhd & Ors And Other Appeals [2015] 7 CLJ 561 FC ***(refd)***
Low Peng Boon v. Low Janie [1999] 1 SLR 337 ***(refd)***
Mak Siew Wei v. Yeoh Eng Kong & Other Appeals [2019] 7 CLJ 470 CA ***(refd)***
Nina Kung v. Tan Man Kou [2004] HKCU 1453 ***(refd)***
Normart Management Ltd v. West Hill Redevelopment Co [1998] OJ No. 391 ***(dist)***
Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 FC ***(refd)***
Pan Pacific Construction Holdings Sdn Bhd v. Ngiu-Kee Corporation (M) Bhd & Anor [2010] 6 CLJ 721 FC ***(refd)***
Paul Murray-Jones v. Hong Kong and Shanghai Banking Corporation & Ors [1982] HKC 127 ***(refd)***
Q2 Engineering Sdn Bhd v. PJI-LFGC (Vietnam) Ltd & Ors [2013] 1 LNS 104 HC ***(refd)***
Re BSB Holdings Ltd [1993] BCLC 246 ***(refd)***
Re Hailey Group Ltd [1993] BCLC 459 ***(refd)***
Re Jayflex Construction Ltd [2004] 2 BCLC 145 ***(refd)***
Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung [1978] 1 LNS 170 PC ***(refd)***
Re Little Olympian (No 3) [1995] 1 BCLC 636 ***(refd)***
Re Little Olympian Each-Ways Ltd [1994] 2 BCLC 420 ***(refd)***
Re Sunrise Radio [2010] 1 BCLC 367 ***(refd)***
Re Tobian Properties [2013] 2 BCLC 567 ***(refd)***
Re Via Servis Ltd; Skala v. Via Servis Ltd [2014] All ER (D) 180 ***(refd)***
Said v. Butt [1920] 3 KB 497 ***(refd)***
Scotia Mcleod Inc. et al. v. Peoples Jewellers Limited et al, 26 OR (3D) 481 ***(refd)***
TH Holdings Ltd (formerly Tonstate (Hotels) Ltd) and Another v. Destiny Investments (1993) Ltd and Another [2017] EWHC 657 ***(refd)***
Wilson v. Alharayeri [2017] 1 SCR 1037 ***(foll)***

Legislation referred to:
Companies Act 1965 (repealed), ss. 176, 181(1)(a), (2)
Companies Act 2016, s. 346(2)
Merchant Shipping Ordinance 1952, s. 11

Companies Act [Sing], s. 216
Companies Act 1948 [UK], ss. 210, 219
Companies Act 1985 [UK], ss. 459, 461
Companies Act 2006 [UK], ss. 175, 994(1)

Other source(s) referred to:
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Mortimer & Simon, *Company Directors: Duties, Liabilities and Remedies,* 2nd edn, UK Oxford University Press, 2013, p 534

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For the 2nd-4th & 6th respondents - Mathew Thomas Philip, Clinton Tan Kian Seng & Rachel Ng Li Hui; M/s Thomas Philip

[Editor's note: For the Court of Appeal judgment, please see Auspicious Journey Sdn Bhd v. Ebony Ritz Sdn Bhd & Ors And Another Appeal [2018] 1 LNS 1392 (affirmed); For the High Court judgment please see [2014] 3 CLJ 309 (affirmed).]

Reported by S Barathi

JUDGMENT

Nallini Pathmanathan FCJ:

Introduction

[1] Albert Camus famously said "Democracy is not the law of the majority, but the protection of the minority." Much like sovereign democracy, shareholder democracy is also bound by one of the bulwarks of corporate law – majority rule, which enforces the will of the majority over and above individual shareholder interests. While this rule promotes efficiency, instances of abuse recur. The tyranny of the majority has often overridden the valid grievances of the minority. But company law has intervened through statute to ensure that the behaviour of the majority does not result in oppression or unduly prejudicial results adversely affecting the interests of the minority. One of these statutory interventions is captured in s. 181 of the Companies Act 1965, now s. 346 of the Companies Act 2016.

[2] Historically, minority shareholders were relegated to the sole remedy of winding up a company under the just and equitable principle. But this single remedy was found to be both insufficient and drastic, resulting in the intervention of the Legislature through the enactment of provisions in our

company law statutes of various remedies. Therefore minority shareholders may resort to claims for oppression, discriminatory conduct, prejudice and mismanagement to redress the balance of power where majority rule takes on authoritarian or tyrannical hues.

[3] Section 181 of our then Companies Act 1965 ('CA 1965') that is now s. 346 of the Companies Act 2016 ('CA 2016') are both identical in form. This statutory provision comprises one of the broadest and most comprehensive statutory shareholder remedies available in the common law world. Section 181 (now 346) provides for the broad involvement of the courts in fashioning a wide-ranging series of remedies for the beleaguered shareholder/s who are able to establish oppression, prejudice or discriminatory acts or omissions by those in control, generally the majority.

[4] Traditionally, the court by way of redress, censures or regulates the majority so as to bring the matters complained of to an end, or provides a remedy to the grievance. Can such remedies be extended so as to devolve liability onto parties other than the majority (or the minority if they are in control), such as directors or third parties? That is the question and central issue before us in this appeal.

[5] More specifically, this appeal raises the issue of whether a director or a third party may be made liable in proceedings brought under s. 181 CA 1965 (now s. 346 of the CA 2016) where the directors (and third parties) of the company in issue are found to have acted in a manner detrimental to the minority shareholder.

[6] In the High Court, the judge found liability under s. 181 CA 1965 was established against the majority shareholder alone, and dismissed the claim against the other defendants, who were directors and third parties. In other words, liability against the directors and third parties under s. 181 CA 1965 was dismissed. The Court of Appeal upheld the findings of the High Court. The basis for the refusal to extend liability to the directors, in essence, was that a director is an agent of a company and could not therefore be personally liable for the breaches or acts of the company, even in an oppression claim under s. 181 CA 1965 (and thereby s. 346 CA 2016). The appellant sought leave to appeal.

[7] Pursuant to leave granted 13 March 2019, the following questions of law arose for consideration before us:

Question 1

Whether the principle in *Abdul Manaf Mohd Ghows & Ors v. Nusantara Timur Sdn Bhd* [1997] 4 CLJ 437; [1997] 3 MLJ 661 (to the effect that a director is an agent of a company and is thereby not personally liable for the breaches or acts of the company) applies to proceedings under

s. 181 of the Companies Act 1965 (now s. 346 of the Companies Act 2016) where the shareholder is itself a company and the acts of oppression and unfair dealings are derived from the mind and acts of the principal directors?

Question 2

Whether a director and/or directors of a subject company who are privy to the wrongdoings perpetrated and/or undertaken at the subject company level, and such wrongdoings have been found to be within the ambit of s. 181 of the Companies Act 1965 Act (now s. 346 of the Companies Act 2016), may be visited with liability pursuant to the said s. 181 (now s. 346 of the Companies Act 2016)?

Question 2.1

If in the affirmative, the circumstances in which such a director or directors may be visited with liability?

Question 3

Whether a third party and/or third parties, who are neither a director or a shareholder of a subject company in which proceedings are brought pursuant to s. 181 of the Companies Act 1965 (now s. 346 of the Companies Act 2016) may be visited with liability, whether jointly and/or severally, for acts within the ambit of the said s. 181 (now s. 346 of the 2016 Act)?

Question 3.1

If in the affirmative, the circumstances in which such third party and/or third parties may be visited with liability?

[8] It is necessary to comprehend the essential facts relating to the appeal. This begins with the relevant parties to the appeal.

The Parties

[9] The parties will be referred to as they were in the High Court. The appellant here, Auspicious Journey Sdn Bhd ('Auspicious Journey') was the plaintiff in the High Court and the minority shareholder, holding twenty per cent (20%) of the shares in a company known as Ebony Ritz ('Ebony Ritz').

[10] Ebony Ritz was the first defendant in the High Court and the subject company in relation to the proceedings under s. 181 CA 1965. It is a nominal defendant. It is the first respondent in this appeal.

[11] Hoe Leong Corporation Ltd ('Hoe Leong') was the second defendant in the High Court. It is the majority shareholder of the subject company, Ebony Ritz, holding eighty per cent (80%) of the shareholding. It is the second respondent in this appeal. Hoe Leong is a corporate entity which is listed on the Singapore Stock Exchange.

[12] Kuah Geok Khim or Paul Kuah ('Paul Kuah') was the third defendant in the High Court. He is a director of both Hoe Leong, the second defendant as well as the subject company, Ebony Ritz, the first and nominal defendant. Paul Kuah is the third respondent in this appeal.

[13] Kuah Geok Lin or James Kuah ('James Kuah') was the fourth defendant in the High Court. Like his brother, Paul Kuah, he is both a director of Hoe Leong as well as the subject company, Ebony Ritz. James Kuah is the fourth respondent in the present appeal.

[14] The third and fourth respondents, Paul Kuah and James Kuah are known collectively as the Kuah brothers in this appeal. With respect to the Kuah brothers, it is in their capacity as directors of Ebony Ritz that this appeal is brought. This is of significance because Paul Kuah and James Kuah were at all times also directors of Hoe Leong.

[15] The fifth respondent, Setinggi Holdings was the tenth defendant in the High Court. It has been dissolved and accordingly, Auspicious Journey will not be proceeding against it.

[16] The sixth respondent, Teh Teong Lay was the 11th defendant in the High Court. He was at all times the sole director and shareholder having control of Setinggi at all times. Although Auspicious Journey has discontinued proceedings against Setinggi Holdings, it is maintaining its action against Teh Teong Lay in his capacity as Setinggi's director.

Facts

Auspicious Journey

[17] Auspicious Journey and Hoe Leong entered into a joint venture to form a joint venture company, namely Ebony Ritz on 11 March 2010. The joint venture was formed specifically to undertake the acquisition of 49% of the shares in a company known as Semua International Sdn Bhd ('Semua International') which had been involved in the tanker chartering business for over twenty years.

[18] Under the joint venture between Auspicious Journey and Hoe Leong, Auspicious Journey was the minority shareholder in the joint venture company, Ebony Ritz, holding 20% of the shares, while Hoe Leong was the majority shareholder, holding 80% of the shares.

[19] Ebony Ritz appointed three directors. Auspicious Journey nominated one director, Andy Kuek while Hoe Leong nominated two directors, namely Paul Kuah and James Kuah, ie, the Kuah brothers.

The Acquisition of 49% Shareholding In Semua International By Ebony Ritz

[20] Semua International was (prior to its acquisition) a wholly-owned subsidiary of Sumatec Resources Berhad ('Sumatec'). Sumatec is an entity with shares listed and quoted on Bursa. Ebony Ritz was to acquire 49% of Sumatec's shareholding in Semua International for a consideration of RM44.1 million.

[21] After such acquisition, the proportion of shareholding in Semua International would be 49:51 in favour of Ebony Ritz and Sumatec respectively. This meant that Ebony Ritz would acquire a significant interest in the oil tanker chartering business of Sumatec through the said acquisition of the 49% shareholding in Semua International.

[22] It is also pertinent that Sumatec had pledged or created security rights in favour of its bondholders represented by Malaysia Trustees Berhad, over its remaining 51% interest in Semua International.

The Several Agreements Executed On 5 May 2010

[23] Ebony Ritz entered into a sale and purchase agreement dated 5 May 2010 with Sumatec to purchase 49% of Sumatec's shares in Semua International for RM44.1 million. Hoe Leong contributed 80% of the purchase price while Auspicious Journey contributed 20%.

[24] On the same date, an Options and Financial Representation Agreement ('OFRA') was entered into between Ebony Ritz, Sumatec and Auspicious Journey granting certain rights and entitlements to Ebony Ritz and Auspicious Journey. Among others, the OFRA provided:

(i) An unconditional and irrevocable guarantee by Sumatec to Ebony Ritz to make good any shortfall in the event Semua International's audited profit after taxation falls short of the financial representations made by Sumatec ('profit shortfall guarantee');

(ii) In the event of a shortfall, various options were granted to Ebony Ritz to satisfy the profit shortfall guarantee. This included an irrevocable grant of a call option by Sumatec to Ebony Ritz, the exercise of which would require Sumatec to sell not less than 2% of the issued and paid up capital of Semua International to Ebony Ritz ('2% call option'). This option, if exercised, would give Ebony Ritz a majority stake and control over Semua International;

(iii) An irrevocable grant of a call option by Sumatec to Auspicious Journey, the exercise of which would require Sumatec to sell not less than 49% of the shares in Semua International to Auspicious Journey ('49% call option'). This would effectively denude Sumatec's retained 51% shareholding, given the 2% option granted to Ebony Ritz as outlined above.

[25] On the same date, Ebony Ritz, Sumatec and Semua International entered into a shareholders' agreement for the purpose of regulating their relationship as shareholders of Semua International as well as the conduct of the affairs of Semua International.

[26] Additionally, Ebony Ritz and Semua International entered into a loan agreement called the Ebony Ritz Loan Agreement, pursuant to which an interest-free term loan facility of RM10 million was granted by Ebony Ritz to Semua International to be utilised by Semua International towards its working capital requirements in relation to its oil tanker chartering business. This was funded by the shareholders of Ebony Ritz in proportion to their respective shareholding namely RM2 million from Auspicious Journey and RM8 million from Hoe Leong.

[27] As set out comprehensively in the grounds of the Court of Appeal, between March and September 2010, there were several contractual expectations envisaged *vis a vis* Ebony Ritz and Sumatec in relation to the oil charter tankering business of Semua International. This included Ebony Ritz accepting that it had to see through payment of certain historical dividends from the oil tanker chartering business to Sumatec. There were also express obligations between the parties which required Sumatec to make proportionate shareholders' advances for the oil tankering business. And Sumatec was to spearhead the intended listing of Semua International on Bursa Malaysia so as to increase its market capitalisation with further contractual terms governing an intended disposal by Sumatec to the co-investors of its remaining 51% shareholding investment in Semua International.

[28] However, these contractual expectations were not met by reason *inter alia* of the following events:

(i) In October 2010 the business required cash advances from the RM10 million facility to be made to it but neither Sumatec or Auspicious Journey made the proportionate contribution. However these advances were subsequently made in January 2011 as envisaged by the RM10 million facility;

(ii) The oil tanker chartering business was under severe financial distress with Hoe Leong as the majority shareholder having advanced in excess of RM38 million directly into the business;

(iii) Sumatec went into financial distress itself and sought court protection orders from its creditors pursuant to the then s. 176 CA 1965, while Sumatec's bondholders were asserting their security rights over the 51% shareholding and calling upon Sumatec to provide a proposal to remedy the default pursuant to which they would exercise their rights.

[29] Unsurprisingly there was a profit shortfall for the financial year 2012 and Sumatec was required to make good the profit shortfall pursuant to the OFRA. Accordingly vide letter of 4 September 2012, Ebony Ritz gave notice to Sumatec as to the profit shortfall and required Sumatec to make good the same in the sum of approximately RM27 million under the OFRA. Sumatech was unable to make good this sum. It also failed to comply with its obligations under the OFRA in relation to the profit shortfall guarantee.

[30] Auspicious Journey then discovered that on 21 December 2012, Hoe Leong had entered into a conditional sale and purchase agreement with Setinggi Holdings, Ebony Ritz and Sumatec for the disposal of the entire retained 51% equity interest of Sumatec in Semua International ('conditional agreement'). This was to allow for a structure in the form of a warehousing arrangement with a view to enabling Hoe Leong to take control of the oil tanker chartering business. Auspicious Journey had no idea that these arrangements had taken place.

[31] What were the terms of this conditional agreement? The effect of the conditional SPA was that 2% was to be purchased by Hoe Leong for RM1.8 million and 49% was to be purchased by Setinggi for RM17 million. This would mean that the entire retained 51% would be held by Hoe Leong as Setinggi was in effect its nominee.

[32] Auspicious Journey's grievance as a minority shareholder of Ebony Ritz may be summarised as follows:

(i) The 2% shareholding in Semua International which ought to have been sold to Ebony Ritz was sold to Hoe Leong for a cash consideration of RM1.8 million payable by Hoe Leong and put into an escrow account;

(ii) The remaining 49% was sold to Setinggi for a cash consideration of RM17 million payable by Setinggi Holdings (a nominee of Hoe Leong) within 24 months of consent being procured from the bondholders. This 49% share option was that of Auspicious Journey, not even Ebony Ritz. Auspicious Journey had lost its option to purchase the same;

(iii) The conditional SPA provided that the rights under the profit shortfall guarantee and Ebony Ritz's 2% call option which had already accrued, were waived or relinquished by Ebony Ritz;

(iv) The conditional SPA further provided for the provision of an indemnity by Ebony Ritz for the due performance of an obligation to be undertaken by Hoe Leong and the reassignment of dividends payable to Sumatec by Semua International.

[33] Why and how had this series of supervening events in breach of the several OFRA agreements occurred? Hoe Leong's explanation was that when Sumatec and Semua International ran into financial difficulties, the joint venture fell apart due to Auspicious Journey wanting to extricate itself from

its investment but Hoe Leong wished to continue. In these circumstances, in order to salvage the enterprise, Hoe Leong maintained that it was necessary to enter into the conditional agreement, which was effectively a salvage and warehousing arrangement. It is pertinent that the conditional SPA never became unconditional and the sale did not go through.

[34] In March 2013, Auspicious Journey became aware of the salvaging and warehousing arrangement. By April 2013, Auspicious Journey realised that Setinggi Holdings was the nominee utilised for the 49% shareholding investment in Semua International under the salvage and warehousing arrangement. It was also made known to Auspicious Journey that Hoe Leong was prepared to place the all-important 2% shareholding in Semua International into Ebony Ritz, provided Auspicious Journey came up with its proportionate contribution for the same. Auspicious Journey however, refused.

[35] Auspicious Journey, as a minority shareholder who had not been made privy to these important decisions on behalf of Ebony Ritz (and itself) was naturally disgruntled. Accordingly, it filed the present originating summons against the defendants, contending that the 51% SPA had expropriated its rights as well as Ebony Ritz's rights under the OFRA. The latter had affected Auspicious Journey's rights as a minority shareholder. Ebony Ritz was a nominal defendant. The fifth-ninth defendants (Quah Yoke Hwee, Boo Song Heng Peter, Ang Siew Koon, Ang Mong Seng and Lim Kok Hoong) were the other directors of Hoe Leong at the material time in addition to James and Paul.

[36] As skilfully summarised by the Court of Appeal (and which I now adopt) Auspicious Journey maintained that its claim fell within the ambit of s. 181 CA 1965 by reason of the conditional SPA which demonstrated that Hoe Leong had utilised its majority powers to cause Ebony Ritz to enter into the conditional SPA, for its own benefit (through its nominee Hoe Leong), to the ultimate detriment of Auspicious Journey as a minority shareholder of Ebony Ritz. This was borne out *inter alia*, by the following matters:

(i) Ebony Ritz's 2% call option was expropriated by Hoe Leong at Ebony Ritz's expense;

(ii) Auspicious Journey's own 49% call option was expropriated by Hoe Leong and its nominee which caused detriment and was prejudicial to Auspicious Journey;

(iii) In order to achieve the foregoing, Hoe Leong and the Kuah brothers had utilised Hoe Leong's majority powers to waive Ebony Ritz's entitlements under the profit shortfall guarantee and Ebony Ritz's 2% call option;

(iv) Hoe Leong and the Kuah brothers had also caused to furnish an indemnity to keep Sumatec indemnified in the event any claims were made against Sumatec. There was also a re-assignment of dividends previously payable such that all previous conditions were waived. This was clearly to the detriment of Ebony Ritz.

[37] In summary, Auspicious Journey sought a declaration that Hoe Leong as the majority shareholder, and the Kuah brothers as directors:

(i) Conducted the affairs of Ebony Ritz in a manner that was oppressive to Auspicious Journey and in disregard of its interests as member of Ebony Ritz;

(ii) Had procured and/or caused to be done and/or threatened to procure or cause to be done to Ebony Ritz an event/s which unfairly discriminated against or which was or is prejudicial to Auspicious Journey as a member of Ebony Ritz.

[38] What was Hoe Leong's response? In brief, Hoe Leong contended that Auspicious Journey brought this action to recover its investment in Semua International, by, *inter alia*, having its 20% shareholding in Ebony Ritz bought over by Hoe Leong.

The Decision Of The High Court

[39] The High Court allowed Auspicious Journey's claim in part. It made findings of fact that the matters set out above were proven. This resulted in a finding in law that the affairs of Ebony Ritz were conducted in a manner oppressive to, and which discriminated against or prejudiced Auspicious Journey, the minority shareholder. However, the High Court dismissed Auspicious Journey's claims against the other defendants, including the Kuah brothers in their capacity as directors of Ebony Ritz, who had been instrumental in determining the supervening events resulting in the entry into the conditional SPA.

[40] The findings of the High Court which are relevant for the purposes of the present appeal are:

(i) The only issue for determination in a minority oppression action is whether there has been oppression by the majority shareholder;

(ii) The directors are not liable for the actions of the company as the directors are agents of the company;

(iii) On the evidence before the court, the breaches of the respective contracts were in the best interest of Hoe Leong in respect of its investment in Semua International. The directors were entitled, if not obligated to take such steps in the exercise of their directors' duties, following the Supreme Court of Newfoundland case of *Imperial Oil Ltd*

v. C & G Holdings Ltd [1990] 62 DLR (4th 261) ('*Imperial Oil*') which was adopted into Malaysian jurisprudence by the High Court in *Q2 Engineering Sdn Bhd v. PJI-LFGC (Vietnam) Ltd & Ors* [2013] 1 LNS 104; [2013] 8 MLJ 157 ('*Q2 Engineering*');

(iv) In our own country, the Court of Appeal in *Abdul Manaf Mohd Ghows & Ors v. Nusantara Timur Sdn Bhd* [1997] 4 CLJ 437; [1997] 3 MLJ 661 ('*Abdul Manaf*') cited with approval the trial judge's statement that a director is merely acting as an agent of the company and would not be personally liable for the acts of the company unless express written provisions exist to impose personal liability on them.

Remedy

[41] The High Court also decided that the most appropriate course of action was to wind up Ebony Ritz, as having regard to the financial situation of Ebony Ritz and the disagreement between the shareholders, it was not viable to keep it as a going concern. The relationship between the shareholders had broken down completely and it was neither just nor equitable for the company to proceed. Moreover, the ultimate purpose for the joint venture had not been, and could no longer be met.

[42] Significantly, the High Court took into account the fact that if a buy-out of Auspicious Journey's shares was ordered, Semua International would be in breach of the provisions of the Merchant Shipping Ordinance 1952 ("the MSO") which requires any company involved in the oil tanker industry to be a majority-Malaysian company.

[43] Auspicious Journey appealed against the decision of the High Court to dismiss the action against the defendants other than Ebony Ritz and Hoe Leong. It also took issue with the High Court decision to wind up Ebony Ritz. Meanwhile, Hoe Leong appealed against the High Court's findings that it was liable.

The Court Of Appeal Decision

[44] The Court of Appeal dismissed both appeals.

[45] In respect of Auspicious Journey's complaint that the High Court ought to have ordered a buy-out of its shares in Ebony Ritz instead of winding it up, the Court of Appeal agreed with the High Court that this was not an appropriate relief considering the financial circumstances of Ebony Ritz.

[46] The Court of Appeal held that to order a buy-out would unjustly enrich Auspicious Journey, and that it should not be allowed to use these s. 181 proceedings to divest itself of a bad bargain. Further, the buy-out would alter Ebony Ritz's position because the consequence would be that Semua International would be a wholly-owned subsidiary of Hoe Leong, a Singaporean entity, thus violating s. 11 of the MSO.

[47] The Court of Appeal also concurred with the High Court that the breakdown in the relationship between the parties as a factor that was relevant and correctly applied by the High Court to order that Ebony Ritz be wound up. The Court of Appeal additionally expressed the view that it would not be appropriate for the court to make a buy-out order when such an order would not be meaningful because the company is no longer a going concern.

[48] In respect of Auspicious Journey's attempt to extend liability to the directors of Hoe Leong, the Court of Appeal affirmed the decision of the High Court that it was trite that the directors could not be held personally liable for the acts of the company, unless it was a personal act or wrongdoing by the directors and that act is outside its obvious agency. The Court of Appeal also held that to make a finding of liability against the directors would necessitate an order for damages against them but this would result in double recovery for Auspicious Journey.

[49] In respect of Auspicious Journey's claim against Setinggi and its director, the Court of Appeal affirmed the High Court decision to dismiss the case against them. The Court of Appeal noted that the 51% SPA was a conditional one with the purpose of creating a warehousing arrangement. However, the warehousing arrangement did not pan out and Setinggi had not proceeded with the purchase of the 49% stake in Semua International, thus the position reverted back to what it was prior to the 51% SPA. Therefore, particularly as Auspicious Journey was not interested in asserting its right to acquire the said 49% interest, Auspicious Journey had no tenable claim against Setinggi Holdings and Teong Lay.

[50] The Court of Appeal emphasised that this was all the more so, since Auspicious Journey maintained that Setinggi was no longer a nominee of Hoe Leong. Therefore, any complaint on the warehousing arrangement had by Auspicious Journey should have been properly directed against Hoe Leong.

[51] The findings against Hoe Leong as a company were affirmed by the Court of Appeal and there was no appeal to the Federal Court. Only Auspicious Journey filed an application for leave to appeal. Thus the findings against Hoe Leong as a company are now final and conclusive. Consequently, the issue which is of concern in this appeal is whether the courts below were right in refusing to attach liability to the directors of Hoe Leong.

The Federal Court Proceedings

The Parties' Submissions

The Appellant's Submissions

[52] Auspicious Journey submitted that question 1 ought to be answered in the negative while questions 2 and 3 ought to be answered in the affirmative.

[53] Questions 2.1 and 3.1 concern the circumstances in which a director and a third party may be made liable, and it is submitted by Auspicious Journey that the court ought to adopt the tests expounded in the Canadian cases of *Wilson v. Alharayeri* [2017] 1 SCR 1037 ('*Wilson*') and *Budd v. Gentra* [1998] O.J. No. 3109 ('*Budd*') and/or the English case of *F&C Alternative Investments (Holdings) Ltd v. Barthelemy & Ors* [2011] EWHC 1731 (Ch) ('*F&C Alternative*'). Relying on the aforesaid cases, Auspicious Journey proposed that liability ought to be imposed where the director and/or third party is implicated in, or so connected to the acts or conduct on which the oppression proceedings are premised.

[54] Auspicious Journey further submits that our s. 181 which traces its descent from the then s. 210 of the UK Companies Act 1948 is wider in scope in comparison to the English s. 210. Thus, our s. 181 should receive an equal if not more liberal interpretation. It is also Auspicious Journey's contention that other Commonwealth jurisdictions have adopted a liberal and purposive approach in the construction of applicable oppression provisions.

[55] On the issue of the joinder of parties, Auspicious Journey submits that the court's jurisdiction is wide and that besides members and shareholders, wrongdoers may be named as proper parties in a s. 181 petition. Accordingly, it is Auspicious Journey's position that wrongdoers who are not members/shareholders may be found liable.

[56] Auspicious Journey asserts that question 1 should be answered in the negative because firstly, an application of the *Abdul Manaf* principle to s. 181 is contrary to the purpose, intent and express wording of that provision. Secondly, it is inconsistent with Commonwealth authorities which have attributed liability to non-member wrongdoers. Thirdly, the *Abdul Manaf* principle which extended liability to directors was made in the context of a contract case where the company was found liable to a third party for a breach of contract. This principle, according to *Auspicious Journey*, has no application to oppression proceedings which centre on the internal conduct of a company's affairs *vis-à-vis* a minority shareholder. *Said v. Butt* [1920] 3 KB 497 ('*Said v. Butt*'), *Imperial Oil* (above), *Q2 Engineering* (above) and *Scotia Mcleod Inc. et al. v. Peoples Jewellers Limited* et al, 26 O.R. (3D) 481 ('*Peoples Jewellers*') deal with common law principles of contract or tort in relation to the personal liability of directors. In the instant case, the impugned conduct and acts of Ebony Ritz were undertaken by James Kuah and Paul Kuah. To apply *Abdul Manaf* (above) to s. 181 amounts to giving the directors of a subject company licence to act oppressively with impunity.

Question 2

[57] Flowing from the above, Auspicious Journey submits that question 2 should be in the affirmative since James and Paul Kuah were the persons undertaking the conduct and acts of Ebony Ritz which was held by the courts

below to have come within the ambit of s. 181. As directors of Ebony Ritz, James and Paul were equipped with full knowledge of Ebony Ritz's rights and entitlements.

[58] However, they had caused Ebony Ritz to relinquish the same by causing the abrogation of Ebony Ritz's 2% call option. James and Paul had also excluded Auspicious Journey and/or Andy Kuek from deliberating on the abandonment of Ebony Ritz's rights and the imposition of obligations on Ebony Ritz *via* the 51% SPA.

Question 3

[59] Auspicious Journey submits that this question should be answered in the affirmative due to the wide discretion the court enjoys under s. 181 of the CA and because there are authorities which illustrate that liability and/or relief may be ordered against third parties. Teh, the sixth respondent, was the sole shareholder and director of Setinggi Holdings, a party to the 51% SPA. He signed the 51% SPA on behalf of Setinggi Holdings. Teh was also the Chief Financial Controller of Hoe Leong and directly involved in the negotiations on the terms and facilitated the entry of the 51% SPA. Thus, he was privy to and participated in the various corporate conduct and acts which were held to have come within s. 181.

[60] On the Court of Appeal's finding that there was no basis to justify relief against Setinggi Holdings and Teh since Auspicious Journey was not interested in exercising the 49% Auspicious Journey call option, and given that Setinggi Holdings no longer has rights to acquire the 49% shares in Semua International, Auspicious Journey submits that these are *ex post facto* events which were not raised on affidavit.

The Respondents' Submissions

[61] The second, third, fourth and sixth respondents ("the respondents") base their defence on the trite legal principle that directors are agents of a company and are not personally liable for breaches or acts of the company, citing *Said v. Butt* (above), *Imperial Oil* (above), *Abdul Manaf* (above), *Q2 Engineering* (above), and that the law recognises only a limited set of circumstances where a director of a company can be held personally liable for his or her actions. This may occur 1) when the actions of a director are prohibited by statute, 2) where a director breaches his or her fiduciary duty to the company under statute/common law (not relevant to the present appeal), and 3) where a director is directly and personally involved in a wrongful act in a manner beyond the director's role as agent of the company, thereby giving rise to tortious claims against the director.

[62] According to the respondents, authorities such as *Peoples Jewellers (above), Normart Management Ltd v. West Hill Redevelopment Co* [1998] OJ No. 391 Docket No. C25986 ('*Normart*') and *Leon Van Neck and Son Ltd v. McGorman* [1998] OJ No 4813 ('*Leon*') establish that:

(i) A director is not liable for acts carried out as an agent of a company;

(ii) A director will only be liable where he or she acts beyond the scope of his or her role as an agent of a company, so as to create a tortious action against the director or exhibit a separate identity or interest from that of the company;

(iii) In identifying whether the act of the director was beyond the scope of his or her role as an agent of the company, it is useful to enquire whether the director has personally benefited from the same.

[63] The respondents' stance is therefore that a director who has exceeded his or her role as an agent of a company may be visited with liability regardless of whether it is a s. 181 minority oppression or otherwise. The respondents argue that in the present case, personal liability cannot be imposed on James and Paul as the courts below had concurrently found that the acts complained of were carried by the third and fourth respondents in the best interest of Hoe Leong. Since those acts could not be said to be done outside the third and fourth respondents' role as agents of Hoe Leong, no personal liability could be said to arise. Auspicious Journey had not advanced the position that the third and fourth respondents had acted beyond their role as agents of Hoe Leong.

[64] In relation to question 3, the respondents acknowledge that liability may extend to third parties under the torts of conspiracy and breach of contract but deny that the same has been made out on the facts of the case. The respondents submit that injury caused by third parties to a company can be addressed by way of a derivative action and not an oppression action.

[65] As for question 3, the appellant contends that whether Setinggi Holdings intended to harm Auspicious Journey's interest is immaterial. Following *Wilson* (above) the provision governing oppression looks to the effect and not the intent of the oppressor.

Our Analysis And Decision

[66] The pivotal question is whether the statutory remedy for minority shareholders in s. 181 CA1965 (now s. 346 CA 2016) allows or provides for redress to be visited upon not only the majority shareholders, but also the directors of the company in question and third parties who have occasioned, or been instrumental or closely connected the course of conduct which is found to be oppressive or in disregard of their interests members (under limb (a)) or which unfairly discriminates against or is otherwise prejudicial to the members (under limb (b)).

[67] This issue will turn to no small extent on the construction to be accorded to s. 181 in its entirety. As such, a consideration of the history and background of the section is merited.

The Law

Origins Of The Remedy Under Section 181 CA 1965

[68] Traditionally, both in this jurisdiction and others, particularly the United Kingdom, there was a long-standing judicial conservatism in relation to corporate law. This is relevant to Malaysia because we have generally looked largely to the United Kingdom (whether justifiably or otherwise) for guidance in applying the law. Jurisprudence followed the general path of non-interventionism in the internal management of company matters, given the existence of the twin corporate law principles of majority rule and the separate legal personality.

[69] Majority rule supports the position that it is legitimate for a majority of the shareholders to control the company through the appointment of directors, who in turn, have the responsibility of running the business of the company. If the majority are unhappy with the directors, then they oust them. If they are prepared to overlook the wrong, then the majority principle dictates that it is not for the court to interfere with that decision of the majority (*Foss v. Harbottle* (1843) 2 Hare 461, 67 ER 189).

[70] The second principle of a company being a separate legal entity, separate from its members and its management, further insulated the conduct of the affairs of a company from being scrutinised by the Judiciary. The concern was that the courts were not equipped to deal with, or assess business decisions, and interference would jeopardise the company's independent status and business. Therefore, if the company itself chose not to sue, then it was generally not appropriate for others to sue on its behalf (see *Foss v. Harbottle* (above)).

[71] These two principles coupled with judicial non-interference, resulted in minority shareholders having very little recourse against acts of the majority which were oppressive or detrimental to the minority in their capacity as shareholders. (The common law did provide remedies prohibiting fraudulent or oppressive conduct. And the rule in *Foss v. Harbottle* (above) was rendered less harsh by the development of several exceptions particularly where there was a fraud on the minority.)

Statutory Redress

[72] In our jurisdiction, statutory redress came in the form of s. 181 when the CA 1965 was enacted. It was drawn on the pattern of the Australian Uniform Companies Act 1961 of the various States of Australia, but with amendments as appropriate due to the lapse of time and local conditions. It affords minority protection where majority rule has been abused. The interpretation of s. 181 has been dictated primarily by judicial interpretation. To that extent, the majority's power has been curbed, when there is abuse, by both statutory and judicial intervention.

Section 181 CA 1965, Now Section 346 CA 2016

[73] Turning now to the express provisions of s. 181 CA 1965 (now s. 346 of the Companies Act 2016):

> (1) *Any member* or debenture holder *of a company may apply to the Court* for an order under this section on the ground:
>
> (a) *that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members* or debenture holders including himself *or in disregard of his or their interests as members, shareholders* or debenture holders of the company; or
>
> (b) *that some act of the company has been done* or is threatened or that some resolution of the members, debenture holders or any class of them has been passed or is proposed *which unfairly discriminates against or is otherwise prejudicial to one or more of the members or debenture holders, including himself.*
>
> (2) *If on such a*pplication *the Court is of the opinion that either of those grounds is established,* the Court may *make such order as the Court thinks fit* with the view *to bringing to an end or remedying the matters complained of,* and without prejudice to the generality of subsection (1), the order may:
>
> (a) direct or prohibit any act or cancel or vary any transaction or resolution;
>
> (b) regulate the conduct of the affairs of the company in the future;
>
> (c) provide for the purchase of the shares or debentures of the company by other members or debenture holders of the company or by the company itself;
>
> (d) in the case of a purchase of shares by the company, provide for a reduction accordingly of capital of the company; or
>
> (e) provide that the company be wound up.
>
> (emphasis added)

[74] Applying the law to the present fact situation, it is evident that the member or shareholder in issue is Auspicious Journey. The company in issue is Ebony Ritz. The majority shareholder is Hoe Leong and the directors mentioned in the section refer to the directors of Ebony Ritz, namely the Kuah brothers. The section does not make reference to the Kuah brothers in their capacity as directors of Hoe Leong. The Kuah brothers wear two "hats" so to speak, and their function as directors of Ebony Ritz must not be conflated with their function and capacity as directors of Hoe Leong.

[75] It is the conduct of the affairs of Ebony Ritz that is in issue and focus. In this case the courts below have found and confirmed that the affairs of Ebony Ritz were conducted in a manner oppressive to Auspicious Journey, in disregard of its interest as a member. While not articulated below, it is equally evident from the factual matrix and findings of fact which are not in

dispute, that the acts of Ebony Ritz conducted through the directors, namely the Kuah brothers comprise conduct which unfairly discriminates against or is otherwise prejudicial to Auspicious Journey.

[76] In making a finding that oppression has been established, it is important to bear in mind that either limb (a) or limb (b) or both limbs may well be satisfied under s. 181 CA 1965. Often limb (b) is simply not examined or considered, although it equally affords basis for the legal test under s. 181 of 'commercial fairness/unfairness' as expounded in the decisions of this court in *Pan Pacific Construction Holdings Sdn Bhd v. Ngiu-Kee Corporation (M) Bhd & Anor* [2010] 6 CLJ 721 at 735A (FC); *Jet-Tech Materials Sdn Bhd & Anor v. Yushiro Chemical Industry Co Ltd & Ors And Another Appeal* [2013] 2 CLJ 277; [2013] 2 MLJ 297 and *Looh Siong Chee v. Numix Engineering Sdn Bhd & Ors And Other Appeals* [2015] 7 CLJ 561; [2015] 4 MLJ 561.

Does a Construction Of Section 181 CA 1965 (Now Section 346 CA 2016) Allow Liability To Devolve On Directors?

[77] Moving onto the central question of whether liability can devolve on the directors of Ebony Ritz, it is clear from the use of the words in limb (a) that the section envisages oppressive conduct as being established where either the "affairs of the company are being conducted" or where the "powers of the directors are being exercised in a manner oppressive …" The fact that the words namely the "exercise of powers by the directors in a manner that is oppressive to its members" are expressly stipulated is of significance. The words cannot be mere surplusage. The words envisage the court scrutinising how the powers of the directors of the company in issue are exercised. The directors are expressly identified in the section to enable the court to make a finding that particular directors for the majority have utilised their powers in a manner which has resulted in oppression to the minority, or is in disregard of the minority's interests.

[78] When limb (a), which expressly identifies the directors' exercise of powers as a basis for establishing oppression, is read with s. 181(2) which in turn gives the court very wide powers to bring such conduct to an end, or to remedying the minorities' grievance, it follows that there is no prohibition against the court granting a remedy which encompasses the directors of the company personally. On the contrary, a construction of s. 181(1)(a) and (2) reveals that the intention of the legislature was to allow the court the freedom to fashion a remedy it thought fit. That would encompass liability devolving on a director directly in circumstances where the director exercised his powers to:

(i) oppress the minority shareholder/s; or

(ii) disregard their interests as members.

[79] Further, a reading of limb (a) of s. 181(1) refers expressly to the "conduct of the affairs of the company", which is a matter which falls within the management duties and powers of the directors, as they manage the company on behalf of the shareholders as a whole. Limb (a) therefore focuses on the acts of the directors expressly in the conduct of the affairs of the subject company. That means that acts of the Kuah brothers (as Andy Kuek was unaware of these acts) in conducting the affairs of Ebony Ritz and materially, its effect on the minority shareholder, Auspicious Journey. These acts conducted by the Kuah brothers on behalf of Ebony Ritz had an oppressive effect on Auspicious Journey, in its capacity as a shareholder. This application of the law in limb (a) allows for the acts of the directors personally to be brought into focus expressly.

[80] Additionally, limb (b) of s. 181 refers to an act of the company itself, or a resolution of the members, which unfairly discriminates against or is otherwise prejudicial to one or more of the members. In other words, limb (b) appears to concentrate on acts of the company and its members as compared to limb (a) which makes reference to the company itself as well as the directors' personal exercise of their powers. This latter construction, to my mind, allows for liability to devolve onto the directors personally.

[81] Support for such a construction is further borne out by the ambit of powers accorded to the court including the prohibition or varying of any transaction or resolution and the regulation of the conduct of the affairs of the company in future. This may very well involve sanctions against the directors in their personal capacity. Put another way, the series of acts set out in sub-s. (2) of s. 181 are not exhaustive provisions circumscribing the powers of the court in moulding relief. This is made clear by the words "without prejudice to the generality of sub-s. (1)". These words allow the court latitude to fashion a remedy that would include imposing liability on the parties or other persons, including directors, who have perpetrated the acts giving rise to the oppressive conduct.

[82] To that extent, statute has cut across or intervened to make provision for personal liability of directors or third parties which is not available under contract law or the common law. Oppression, it should be borne in mind, is a minority shareholder remedy against those controlling the company. That will naturally include the directors who manage the company at the behest of the minority, as well as the majority itself. Therefore, relief against the directors is a natural and logical consequence, if they have indeed behaved oppressively to the minority. This is so by reason of the express provisions of s. 181.

[83] This statutory remedy which has been specifically enacted to protect the minority, ought not to be confused with matters of contract and tort where an action is brought by a third party against the company as an entity. In such a context, a director is indeed an agent of the company and generally

liability would devolve against the company itself and not the director. In an oppression situation, the dispute relates to matters between various actors within the company. The dispute arises *inter se* between the minority and the majority who include the directors. The statute therefore does not proscribe or veto liability falling on actors such as directors provided the factual matrix warrants the imposition of such liability.

[84] As perceptively and astutely construed in the written submissions for Auspicious Journey, s. 181 contemplates the "affairs of the company" and "acts of the company" from two vantage points. Firstly, at the management level which must encompass the directors. And secondly at the shareholder level. This bears out the fact that while the company is a separate legal entity, it comprises two distinct organs, ie, the board of directors and the members/shareholders respectively. Section 181 therefore targets conduct or acts of the company at both the directors and shareholders' levels. Bearing in mind that the statute seeks resolution for a dispute *inter se*, as opposed to a dispute from a third party outside of the company, such a construction is legally rational and coherent.

[85] It might be said that there is no specific authority to support this construction of the section, but it must be borne in mind that our s. 181 CA 1965 (now s. 346 CA 2016) is unique in that while it borrows portions and concepts from other jurisdictions, it is worded distinctively. As such, it is necessary to construe it as it reads, and not so as to be consonant with legislation in any other jurisdiction particularly. The Legislature saw fit to word s. 181 (now s. 346) as it states, and accordingly judicial construction must accord the provision the intention Parliament sought fit to enact, namely a wide and broad remedy encompassing not only the majority, or the company, but also the directors and third parties where necessary, with a view to bringing the oppressive or prejudicial conduct to an end or remedying it.

[86] It is of equal importance to incorporate into this construction the purpose and intent of the Legislature in enacting this statutory remedy. It is a remedial provision to arrest the mischief of the inadequacies of the common law in protecting the interests of the minority shareholders as examined earlier. Bearing in mind that judicial pronouncements have pointed out that our s. 181 is wider in scope than the now repealed s. 219 of the English Act, our statutory provision therefore requires a liberal and broad interpretation, not a narrow or restrictive one. (see *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung* [1978] 1 LNS 170; [1978] 2 MLJ 227 (Privy Council) ('*Re Kong Thai*'); and *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716; [1996] 1 MLJ 113 (FC)).

[87] In any event, such an approach has been adopted in the construction of oppression provisions throughout the Commonwealth. This lends support to the liberal interpretation accorded to s. 181 above.

[88] This is borne out by the decision of this court in *Koh Jui Hiong & Ors v. Ki Tak Sang & Another Appeal* [2014] 2 CLJ 401; [2014] 3 MLJ 10 at p. 424 (CLJ); p. 28 C-G (MLJ) ('*Koh Jui Hiong v. Ki Tak Sang*') where it was held:

> [26] Damages to members is not amongst the reliefs mentioned in s. 181(2) which provides that 'If on such application the court is of the opinion that either of those grounds is established the court may, with the view to bringing to an end or remedying the matters complained of make such order as it thinks fit and without prejudice to the generality of the foregoing the order may (a) direct or prohibit any act or cancel or vary any transaction or resolution; (b) Regulate the conduct of the affairs of the company in future; (c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself; (d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or (e) provide that the company be wound up. That is not however to say that the court could not award any other relief. Section 181(2) is a non-exhaustive list that does not limit other types of relief that the court could fashion, with the view to bringing to an end or remedying the matters complained of (see *Company Law in Context, Text and Materials*, by David Kershaw at p 635). As said by Lord Wilberforce in *Re Kong Thai Sawmill*, s. 181 'leaves to the court a wide discretion as to the relief which it may grant, including among the options that of winding the company up'. That discretion is evidently wide enough to order reliefs not mentioned in s. 182(2) …'

Other Jurisdictions

[89] Having construed our specific oppression remedies as contained in s. 181 CA 1965 (and now s. 346 CA 2016), it must be said that the statutory oppression regime in other jurisdictions such as Singapore, the United Kingdom and Australia, while employing differing terminology, share the common purpose of protecting minority shareholders against abuse of majority power. Consequently, it is instructive to examine the jurisprudence in the aforementioned countries to determine the breadth of their equivalent provisions with a view to ascertaining whether the reach of their oppression provisions extends to directors of the subject company or third parties. (See Chew, Margaret, *Minority Shareholders' Rights and Remedies*, 3rd edn., (Singapore: LexisNexis, 2017) at 177, *Ho Yew Kong v. Sakae Holdings Ltd* [2018] SCGA 38 at para [96].)

United Kingdom

[90] In the UK, the introduction of the unfair prejudice remedy *via* statute[1] empowered the courts to grant relief in ways which allows liability to lie against directors in respect of their conduct of the affairs of the company or their acts or omissions: Mortimer, Simon, ed., *Company Directors: Duties, Liabilities and Remedies*, 2nd ed., (UK: Oxford University Press, 2013), 534.

[91] As submitted by the appellant, in the English case of *Re Little Olympian* [1994] BCLC 420, the English High Court considered their then equivalent of our s. 181 (ss. 459 and 461 of the UK Companies Act 1985) and held that "the greatest possible flexibility" was intended by the Legislature to be given to the courts. It was further held that in appropriate cases, relief can be sought against a non-member other than the company itself. (See also *Re Tobian Properties* [2013] 2 BCLC 567 where the concept of fairness in the phrase 'unfairly prejudicial' in s. 994(1) of the UK Companies Act 2006 was construed to mean "flexible and open-textured" allowing the court a wide power to mould the appropriate relief to produce a just remedy).

[92] The allowance for a wide and liberal construction to mould a remedy flexibly envisages, by logical inference, the ability to mould a relief against *inter alia*, directors and/or third parties, where the facts justify it, in order to bring the oppression to an end or to remedy it.

[93] In *Re Sunrise Radio* [2010] 1 BCLC 367 at 436 a-d (EWHC) the English High Court found that unfair prejudice had been established and held individual respondents who were shareholders and/or directors of the subject company responsible for the acts complained of. In coming to this conclusion, the English High Court scrutinised the conduct of the directors and found their conduct to be unfairly prejudicial. This included *inter alia*, the dilution of the minority petitioner's shareholding through the allotment of new shares in the subject company to the majority shareholder at nominal par value and the failure to obtain shareholders' approval for a sale of the subject company's property to one of the directors.

[94] In *Re Little Olympian (No. 3)* [1995] 1 BCLC 636 at 666f-g & 684 g-I (EWHC) the English High Court found a scheme to hive up the assets of a subject company at a substantial undervalue to be "unfairly prejudicial" which is the term utilised under the relevant United Kingdom legislation. A buy-out was consequently made against the former shareholder of the subject company who was found to be the perpetrator and beneficiary of the scheme. The remedy was granted against a third party.

Canada

[95] In Canada too, the courts have adopted this approach, namely that the oppression provision should be interpreted broadly in order to carry out the purpose of the Legislature. To that extent, the courts there have repeatedly stated that they are conferred with a wide jurisdiction and discretion to fashion a remedy that will achieve fairness on the given facts of a case. In *Ferguson and Imax Systems Corp* [1983] OJ No. 3156 at para. 30 (Ontario Court of Appeal) – "But s. 234 must not be regarded as being simply a codification of the common law. Today, one looks to the section when considering the interests of the minority shareholders and the section should be interpreted broadly to carry out its purpose …"

[96] And in *BCE Inc v. 1976 Debentureholders* [2008] 3 SCR 560 at paras. 56-59 (Supreme Court of Canada) in construing the best approach to the interpretation of the Canadian equivalent of the oppression provision under the Canada Business Corporations Act 1985, held that the principles underlying the oppression remedy should first be looked at. As it is an equitable remedy, it seeks in essence to ensure fairness. Therefore, the courts have a broad jurisdiction and "should look at business realities and not merely narrow legalities." (see also Catalyst Fund General Partner I Inc Hollinger inc 79 OR (3d) 288 at paras. 49 and 54 (Ontaria Court of Appeal) where the Canadian Court of Appeal reiterated that the court's powers under their oppression provision was "amongst the broadest and most flexible of the powers vested in the courts in the corporate law domain" and should be exercised judicially in a manner consistent with the legislative intent and statutory object.

[97] In the context of our jurisdiction, our equally broad s. 181 (now s. 346) would also point to relief being available to a broad range of persons, when construed in the same spirit, namely to give effect to legislative intent and statutory object, namely to afford fairness to the oppressed minority. This would necessarily include directors and third parties, if so justified on a particular factual matrix, with a view to bringing the oppression or prejudicial conduct to an end, or affording a remedy for it to the minority shareholder.

Hong Kong

[98] Similarly, in Hong Kong, the oppression provisions have been construed widely and liberally having regard to the object of the applicable provisions. In *Nina Kung v. Tan Man Kou* [2004] HKCU 1453 at para. 39 the Hong Kong Court of Final Appeal held that "there is no doubt about the width of the statutory language of s. 168A(2)" and adopted the English position in *Re Little Olympian*. This is a clear nod to the imposition of liability on parties other than the majority shareholder.

Joinder Of Directors And Third Parties As Respondents In An Oppression Petition

[99] The fact that third parties and directors may be made respondents to an oppression action further supports the construction that liability may devolve upon such respondents. This is because it follows that if directors and third parties are proper parties for the purposes of a joinder application, then relief should accordingly be available against them. Otherwise it would be pointless to allow them to remain as respondents or defendants, if no redress or relief is available against them at all.

[100] There is nothing in our s. 181 CA 1965 (now s. 346 CA 2016) specifically saying that only members of the company, its directors, or those in control of the company may be made respondents. There is authority for the proposition that all alleged oppressors are proper parties, including third

parties who participated in the transactions forming the substratum of the complaint and parties who are affected by the relief sought: *Re BSB Holdings Ltd* [1993] BCLC 246, *Foo Ban Nyen v. Foo Yet Kai & Sons Sdn Bhd & Ors* [1991] 2 CLJ 1364; [1991] 2 CLJ (Rep) 612, *Re Little Olympian Each-Ways Ltd* [1994] 2 BCLC 420.

[101] An instance where the court joined non-members who participated in the impugned conduct is reflected in the case of *Kejutan Holdings Sdn Bhd v. Magnum 4D (Perak) Sdn Bhd & Ors* [2005] 2 CLJ 766 ('*Kejutan*'). Here, the court dismissed the eighth and ninth respondents' application to cease to be parties to the petitioner's s. 181 petition on the ground that the petition contained specific allegations of misconduct and fraud against them. The eighth and ninth respondents were third party companies. The court held that in the face of those allegations, it was imperative that the eighth and ninth respondents address or respond through affidavits to the allegations made against them. This approach envisaged that liability would fall on these third parties if the allegations were made out.

[102] In a similar vein, in the United Kingdom, Vinelott J declined to strike out B Sky B as a respondent in *BSB Holdings* (*supra*) because it was directly involved in the transaction complained of and the relief being sought for by the petitioner would affect B Sky B's shareholding.

[103] So too in *Paul Murray-Jones v. Hong Kong and Shanghai Banking Corporation & Ors* [1982] HKC 127 where the petitioner joined the bank, the subsidiary of the bank which held shares in the company, and four nominee directors of the bank in the company as respondents. In refusing to strike out the four nominee directors as respondents, the court said at p. 131 that:

> It is not necessary for us to decide whether the nominee directors could properly be ordered to buy the petitioner's shares: the petitioner has, perhaps sensibly not asked that they should. **Nevertheless, it may appear at the trial that some other order could properly be made against them personally.** The fact that an order against the company might indirectly have the same effect does not seem to me to be a bar to the making of a direct order. It is for the petitioner to decide whom he will join and only if it were clear that no possible benefit could accrue to him from the joinder of the nominee directors could it fairly be held that the proceedings against them were an abuse of the process. **The powers of the court under s 168A are so wide that I am not prepared to say that no possible benefit might result from the joinder.**
>
> (emphasis added)

[104] While the above authorities establish that the court indeed has wide jurisdiction to add relevant parties to an unfair prejudice action, they do not deal with the basis or rationale premised on which a director or a third party may be made personally liable for oppressive conduct.

The Underlying Rationale For Making A Director Or A Third Party Personally Liable For Oppressive Conduct

United Kingdom

[105] In the English case of *F & C Alternative Investments (Holdings) Ltd v. Barthelemy and Another (No 2); Barthelemy and Another v. F & C Alternative Investments (Holdings) Ltd and Others (No 2)* [2012] Ch 613 ('*F & C Alternative*') the court held that that the test of attribution of responsibility for unfairly prejudicial conduct to a defendant under the relevant provisions of the UK Companies Act 2006, beyond the narrow class of case where an agency relationship existed, was whether the defendant was so connected to the unfairly prejudicial conduct in question that it would be just in the context of the statutory regime to grant a remedy against him in relation to that conduct.

[106] In relation to the criterion of what was "just", Sales J acknowledged at para. 1096 that:

> In practice, everything will depend upon the **facts** of a particular case and the court's assessment whether what was done involved unfairness in which the relevant defendant was **sufficiently implicated** to warrant relief being granted against him. (emphasis added)

[107] In *F & C Alternative* (above), a limited liability partnership ("the LLP") was constituted between two individual members, Culligan and Barthelemy, and a corporate member, F & C Alternative Investments (Holdings) Ltd ("Holdings"). Holdings is part of the F & C group of companies, which carry on a range of businesses in the field of asset management. The head company in the group is F & C Asset Management plc ("F & C plc"). Holdings is a wholly-owned subsidiary of F & C plc. The individual members brought an action against Holdings and F & C plc alleging unfair prejudice in the affairs of the LLP. The court held that while F & C plc might have been one step removed from the affairs of the LLP in that it was not a party to the partnership agreement, it should be held liable for the unfair prejudice that arose from the acts of Holdings as its subsidiary was in reality a "cipher" for the F & C group, and F & C plc in particular.

[108] The "sufficient connection" test propounded in *F & C Alternative* (above) was the subject of further consideration by Asplin J in *Destiny Investments (1993) Ltd and Another v. TH Holdings Ltd (formerly Tonstate (Hotels) Ltd) and others; TH Holdings Ltd (formerly Tonstate (Hotels) Ltd) and Another v. Destiny Investments (1993) Ltd and Another* [2017] EWHC 657 (Ch). Here the court observed that the cases in which personal liability was extended were "highly fact sensitive" and opined at para. [158] that:

> … merely being connected with the acts complained of cannot be enough. If that were the case, personal liability would be imposed in most cases because a company acts through its board of directors. As a matter of logic, **more is necessary.** In some circumstances, no doubt, relevant factors would be whether the company in question had been a mere cipher for the individual and whether that individual had **benefitted**, for example, from the diversion of the company's business or had otherwise benefitted from the unfairly prejudicial conduct.
>
> (emphasis added)

[109] On the facts, although unfair prejudice was conceded, the directors were accepted to have acted in good faith. This, taken with the fact that the project itself was always a speculative one where a sale was intended, led the court to rule that holding the directors primarily or secondarily liable would be overcompensating the petitioners by insulating them from the effects of the market.

[110] *In re Dinglis Properties Ltd v. Dinglis and Others* [2019] EWHC 1664 (Ch) the first respondent, Andreas, was the director and majority shareholder in the third respondent, a family company. Initially, his shareholding was held in his own name but it was later transferred to the second respondent, a company incorporated in the British Virgin Islands.

[111] The petitioner, Andreas' son and a minority shareholder in the third respondent, brought a petition under s. 994 of the UK Companies Act 2006 alleging that he had been unfairly prejudiced in his capacity as a minority shareholder of the company by the actions of the first and/or second respondents and sought an order that they purchase his shares. The petitioner alleged that the unfair prejudice had arisen, *inter alia*, from payments made from the company in respect of loan agreements and a consultancy agreement, which were initiated by the first respondent and in which he had a personal interest.

[112] The petitioner alleged that there had been a breach of the director's fiduciary duty under s. 175 of the 2006 Act to avoid a situation in which he had, or could have, a direct or indirect interest that conflicted with the interests of the company.

[113] It was held that the petitioner had been unfairly prejudiced in his capacity as a minority shareholder by some of Andreas' actions. Given Andreas' admitted status as sole owner and controller of the second respondent and given the fact that no distinction was made between them in the conduct of the petition, it was just, in the context of the statutory scheme as a whole, to make an order requiring both to acquire the petitioner's shares. Thus, liability was extended to third party held to be under control of majority director/shareholder as well as the majority director/shareholder.

Canada

[114] In Canada, the Supreme Court in *Wilson* explained the circumstances in which a director may be held to be personally liable for oppression. In *Wilson*, the claimant's grievance arose from the dilution in value of a certain class of his shares compared to the more favourable treatment received by the president of the company *vis-à-vis* the latter's shares. The Canadian Supreme Court adopted the twin-fold approach as espoused by the Ontario Court of Appeal in *Budd* (above) in deciding whether personal liability was to be extended to a director, namely:

(i) the oppressive conduct must be properly attributable to the director because of his or her implication in the oppression.

(ii) the imposition of personal liability must be fit in all the circumstances.

[115] In relation to (ii), the Canadian Supreme Court fashioned four instructive *indicia* as guidance:

> First, the oppression remedy request must in itself be a **fair way** of dealing with the situation. It may be fair to hold a director personally liable where he or she has derived a personal benefit in the form of either an immediate financial advantage or increased control of the corporation, breached a personal duty or misused corporate power, or where a remedy against the corporation would unduly prejudice other security holders. These factors merely represent *indicia* of fairness. The presence of a personal benefit and bad faith remain hallmarks of conduct attracting personal liability, but like the other *indicia*, they do not constitute necessary conditions. The fairness principle is ultimately unamenable to formulaic exposition and must be assessed in light of all the circumstances of a particular case. Second, any order should go **no further than necessary** to rectify the oppression. Third, any order may serve only to **vindicate the reasonable expectations of security holders, creditors, directors or officers in their capacity as corporate stakeholders.** And fourth, a court should consider the general corporate law context in exercising its remedial discretion. **Director liability cannot be a surrogate for other forms of statutory or common law relief, particularly where it may be more fitting in the circumstances.**

[116] The Canadian Supreme Court, like its counterparts in other jurisdictions, similarly stressed that fashioning a fit remedy was a "fact-dependent exercise".

[117] On the facts, Wilson had played a "lead role" in the board's discussions. Not only that, he had obtained a personal benefit because he was able to exercise his conversion rights in advance of the private placement while the complainant could not, which had led to an increase in Wilson's holdings and a dilution of the complainant's shares. Thus, the imposition of liability on Wilson was fair.

Singapore

[118] Moving on to Singapore, the Court of Appeal recognised in *Ho Yew Kong v. Sakae Holdings Ltd and Other Appeals and Other Matters* [2018] SGCA 33 that the court has a wide discretion to fashion the appropriate remedy if oppression is established, which extends to making orders for the errant shareholders or directors of the company concerned to make restitution to the company of moneys that they have wrongfully diverted from the company: see para [118].

[119] In this case, Sakae, the Company and Gryphon Real Estate Investment Corporation Pte Ltd ("GREIC"), whose shareholders at the material time included Andy Ong, Ong Han Boon and Ho, entered into a joint venture agreement in September 2010, under which the company was intended to be the vehicle through which the parties would invest in units at Bugis Cube, redevelop those units and sell them at a profit. Sakae was the minority shareholder in the Company, while GREIC was the majority shareholder.

[120] Sakae left the management of the company to Andy Ong and Gryphon Capital Management Pte Ltd, a company controlled by Andy Ong which was established to manage the company's real estate investment. Over the years, Andy Ong masterminded the diversion of the company's assets to companies in the ERC Group by way of seven transactions. These wrongful transactions were uncovered in October 2012, leading Sakae to commence the oppression action.

[121] The trial judge allowed most of Sakae's claims, finding that six of the seven impugned transactions were oppressive to Sakae and that Andy Ong had breached the fiduciary duties which he owed as a director of Sakae. The judge also ordered the company to be wound up.

[122] The defendant-directors in *Sakae Holdings* who were sued by Sakae for breach of fiduciary duties for depriving the company of its assets argued that wrongs alleged in the oppression action against them were essentially corporate wrongs reflective of the company's losses and therefore derivative in nature. Rejecting this line of argument, the Singaporean Court of Appeal held that where an act of oppression features both personal wrongs against the shareholder and corporate wrongs against the company, the court needs to consider the real injury that is complained of and the essential remedy that is sought in ascertaining whether an oppression claim brought under s. 216 of the Companies Act (Cap 50, 2006 Rev Ed) is an abuse of process ("the injury/remedy analytical framework").

[123] Regarding concerns of a risk of double recovery or prejudice to the creditors or shareholders of the company, the Court of Appeal explained that this should be dealt with by crafting the orders made in suitable terms to avoid such a risk.

[124] Andy Ong and Ong Han Boon were rightly found by the trial judge to be liable for oppression given their deliberate involvement in the impugned transactions with full knowledge of the true effect of the transactions, considering that no argument was advanced by them to challenge the judge's findings on their involvement in the impugned transactions.

[125] Restitutionary orders in favour of the company were granted to ensure a fair exit value for the oppressed member, in that any restitution received would go directly to the company, such that upon its winding up, all its shareholders (including Sakae) would receive the appropriate and due realisation of their investment in the company: see para [128].

Legal Test To Determine Whether Liability Should Be Imposed On A Director Or A Third Party

[126] From the liberal construction accorded to s. 181 CA 1965 (now s. 346 CA 2016) above, and a detailed consideration of the jurisprudence from other jurisdictions, all of which seek to achieve the same underlying purpose of achieving fairness for minority shareholders where there has been abuse by the majority *vide* directors or third parties, it may be concluded that it is open to the courts in this jurisdiction to impose liability against directors or third parties provided there is a sufficiently close nexus between the oppressive or unfairly discriminatory conduct, or disregard of the minority's interests or otherwise prejudicial conduct and that party. It requires something more than the mere fact of their being directors who had conduct of the affairs of the company at the material time. It requires deliberate involvement in the impugned transactions, or a sufficiently close nexus, participation or connection to warrant the imposition of liability to directors or third parties.

[127] I would respectfully accept and adopt the reasoning as enunciated by the Canadian Supreme Court in *Wilson* (above) as epitomising how an assessment is to be made as to whether in any given complaint of oppression, liability has been established against a director and/or third party.

[128] To that extent, I restate the legal test applicable as follows:

(i) Firstly, there should be evidence of deliberate involvement or participation in, or a sufficiently close nexus to the oppressive or detrimental or prejudicial conduct that the minority complains of, to warrant the attribution of liability to a director or third party;

(ii) The imposition of liability should be fair or just in all the circumstances of the particular case;

(iii) In assessing whether the imposition of such liability is fair or just, the court should be satisfied that the remedy results in fairness to the parties concerned as a whole. In this context, liability may well be more easily assessed and imposed where a director has breached his duties, acquired personal benefit or where his acts or omission will result in prejudice

to other shareholders. However, the foregoing examples do not comprise conditions without which liability will not be imposed. Ultimately, the facts and factual matrix of each particular case will determine whether or not the imposition of liability on directors and/or third parties is justified. Such an assessment is undertaken on an objective basis.

(iv) The attribution or imposition of liability should be circumspect, going no further than is necessary to remedy the breach complained of or to stop the oppressive or prejudicial conduct.

(v) Such imposition of liability must be reasonable, and serve to alleviate the legitimate concerns of the shareholders of the company in question;

(vi) In exercising its powers under s. 181 CA 1965 (now s. 346 CA 2016) the court should bear in mind general corporate law principles, such that director liability does not become a substitute for other statutory relief or under the common law.

(vii) In summary, the question for the court is whether in the context of s. 181 CA 1965, the defendant was so connected to the oppressive, detrimental or prejudicial conduct that it would be fair and just to impose liability against him for such conduct.

Application Of The Law Above To The Present Appeal

[129] The courts below declined to allow liability to be made out against the Kuah brothers in their capacity as directors of Ebony Ritz or the third parties Setinggi and Teh. In so declining, the courts below relied on the proposition that as directors are agents of the company, no liability can devolve on them.

[130] To my mind, the courts below erred in law in adopting such a position, given the jurisprudence we have set out in detail above. In so determining, the lower courts relied on a series of cases espousing the general corporate law position that directors stand in the place of an agent in relation to a company and to that extent are not liable for the acts of the company. The independent corporate legal personality prevails to preclude liability from devolving directly on the directors. While this may well be the general position, in the case of oppression, the Legislature has provided specific statutory relief, and that must necessarily prevail over the general corporate law position in relation to relief from oppression for shareholders.

[131] I now turn to examine the cases cited by the courts below in declining to extend liability to the respondents.

(i) *Abdul Manaf Mohd Ghows & Ors v. Nusantara Timur Sdn Bhd* [1997] 4 CLJ 437; [1997] 3 MLJ 661 (*Abdul Manaf*)

The vendors were the shareholders of a private limited company known as Seri Naga. Nusantara Timur entered into an agreement to purchase the entire shareholding of Seri Naga for RM1 million, but subsequently defaulted on the balance purchase price of RM850,000. It was alleged

that there was a subsequent agreement between the parties that the second and third respondents, who were directors of Nusantara Timur, undertook to assume liability personally for the balance of the purchase price. The vendors sued the three respondents for: (i) the RM850,000; (ii) interest from the date of default to date of judgment; (iii) interest on the judgment sum at 8% per annum from the date of judgment to the date of realisation; and (iv) damages. The trial judge dismissed the vendors' claims against the directors.

The Court of Appeal affirmed the High Court's reasoning that a director or an authorised officer of a company who executes an agreement on its behalf is merely acting as an agent of the company and is thereby not personally liable for the breaches or acts of the company, unless there are express provisions in the agreement or other document to the contrary making the director or officer personally liable for the breaches or acts of the company.

It is evident that this case is on a completely different footing from the present appeal in that *Abdul Manaf* ('above') is not a case involving claims of oppression by minority shareholders. It is a case of the breach of contract by a company as purchaser (Nusantara Timur) in a sale and purchase transaction of shares with a third party vendor. When the third party vendor sought to make the directors personally liable for a contract to which only the company was party, it was correctly held that no liability could accrue to the directors, given that a company is a separate legal entity with its own corporate existence and personality. The director was merely the agent who effected the company's will. This case therefore has no application in an oppression matter, where the dispute is between shareholders of the company *inter se*, as explained earlier. Moreover, there is specific statutory provision for such a shareholder dispute, which is completely inapplicable in a situation such as *Abdul Manaf* (above). The utilisation of *Abdul Manaf* (above) is therefore, with respect, erroneous.

(ii) *Said v. Butt* [1920] 3 KB 497

Here, the plaintiff claimed damages from the defendant, the manager of the theatre, for maliciously procuring the proprietors of the theatre to break a contract for the admission of the plaintiff to the theatre. The court held that if a servant acting *bona fide* within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken.

Similarly, the application of *Said v. Butt* is misconceived for the same reason why *Abdul Manaf* ('above') is inapplicable. As in *Abdul Manaf* ('above'), this was a situation where a third party was suing the manager of the company in tort for injury, more properly brought against the company itself. The principle of the case is instructive when dealing with a third-party claim brought against an agent acting within the scope of his authority, instead of the principal. The principal is the proper party. *Said v. Butt* (above) is authority for that proposition. It relates to the law of agency and/or employment. It does not deal with an oppression action, governed by a specific statutory provision under the Companies Act. It does not therefore comprise proper authority for shareholder disputes in corporate law under a specific statutory provision relating to oppression.

It is compelling to note that these cases which are governed by the Contracts Act 1950 or the common law, cannot override the specific statutory provision for oppression in the Companies Act. To that extent the lower courts erred in applying what is essentially the common law principles under general corporate law for transactions or claims involving third parties, rather than construing and applying s. 181 CA 1965. There was confusion between the general corporate law concept of a director being an agent of the company in relation to third party transactions and claims, with the position of a director in the context of an oppression claim where the dispute is within the company between the shareholders *inter se.*

(iii) *Imperial Oil Ltd. v. C & G Holdings Ltd.* (1990) 62 DLR (4th) 261

This was an action for specific performance of a contract or contracts relating to the operation of a service station. One of the questions was whether the directors and shareholders of a company could be found liable in damages to a third party plaintiff for interfering with a contractual relationship between the plaintiff and the company itself, which was the first defendant in the claim. In short, the question was whether, in a claim based in contract for specific performance against a company, by a plaintiff who is a third party, the directors and shareholders of that company were liable for the tort of inducing a breach of contract between the company and the third party plaintiff.

The Newfoundland Court of Appeal held *inter alia* that a finding that a director is liable for wrongfully inducing breach of contract by the company, whose affairs he or she is directing, will require more than knowledge by the director that legal rights of others will be violated by his or her actions in bringing about the corporate breach. No presumption of intent can flow from that knowledge because of the director's concomitant obligation to the company. A director will be

immune from liability for procuring the breach where he or she acts *bona fide* within the scope of his or her authority in the best interests of the company. When not so acting, the director does not attract automatic liability unless the circumstances show that his or her dominating concern was focused upon depriving the complainant of its contractual benefits.

Again, this case is not authority for the proposition that directors and shareholders cannot be made liable in an oppression claim in relation to conduct by the directors which is oppressive and prejudicial to the minority shareholders. It is instead authority for the proposition that generally a director of a company will not be held liable for a breach of contract by a company simply because he executes or fails to execute acts on behalf of the company in the course of his duties as director. Again, this relates back to the ingrained principle that a company has its own legal personality and subsists separately from its directors and shareholders. It is only in exceptional circumstances that personal liability will be visited on the director as explained above. This situation however is somewhat removed from an oppression claim where the dispute is between shareholders *inter se* and can involve the exercise of directors' powers in an oppressive manner, as stipulated in s. 181 CA 1965 (now s. 346 CA 2016).

(iv) *Q2 Engineering Sdn Bhd v. PJI-LFGC (Vietnam) Ltd & Ors* [2013] 1 LNS 104; [2013] 8 MLJ 157

Here the court applied *Said v. Butt* (above) and *Imperial Oil* (above) and held that for the tort of inducing a breach of contract to bite, the alleged inducer must necessarily be a 'stranger' to the contract alleged to have been broken as such.

As such, prior consultation by the first defendant with the parent company (the second defendant) or even another subsidiary (whether wholly-owned or otherwise) (the third defendant) does not derogate or diffuse the concept of separate legal entity so as to transform the decision of the first defendant to also become that of the third defendant under the tort of inducing a breach of contract.

The comments made earlier in relation to the distinction between contractual and tortious situations involving third parties as compared to oppression actions governed by statute are reiterated here. The application of such case-law is fundamentally erroneous.

[132] The respondents also rely on the case of *Peoples Jewellers* (above) in support of their position. Here, the plaintiffs were purchasers of issued senior unsecured debentures of P Ltd. At the time the debentures were issued, P Ltd was a party to two agreements pursuant to which it was conditionally liable for certain obligations of companies in which it was a shareholder. The

prospectus, debenture purchase agreement and the information package did not disclose those agreements. The plaintiffs sued the defendants (a firm of underwriters, a senior vice-president of that firm, and a firm of solicitors who acted for the plaintiffs and for P Ltd at the material times), alleging that the existence of the undisclosed liabilities was crucial to their decision to purchase the debentures, that they relied on the documents in the information package in making their decision, and that the omission of any reference to the agreements in the information package and in the other information provided to the plaintiffs constituted an intentional or negligent material misrepresentation on the part of the defendants.

[133] The court held that to hold the directors of P Ltd personally liable, there had to be some activity on their part that took them out of the role of directing minds of the corporation. In this case, there were no such allegations. CG and IG were in a different position by virtue of being the two most senior executive officers of P Ltd. It was alleged against them that they were directly and personally involved in the marketing of the debentures and that they were involved in making certain representations personally which were relied upon by the defendants. The defendants had also made an allegation of negligent misrepresentation against both of them personally. While the authorities make clear that officers of corporations who are the directing minds of the corporation have the same identity of interest as the directors and thus the same immunity to suit, the action against CG and IG should not be dismissed at this stage simply because it was novel in law.

[134] The respondents' reliance on *Peoples Jewellers* (above) is, with respect, misconceived for the same reasons. *Budd* (above), which laid the foundation for the test of attribution of liability subsequently developed in *Wilson* (above), jettisoned the view that *Peoples Jewellers* (above) has any application to unfair prejudice proceedings by holding that when a remedy is sought against directors personally, a plaintiff is not attempting to circumvent the principles which govern the liabilities of directors generally, but making a "fundamentally different" type of claim than that dealt with in *Peoples Jewellers* (above).

[135] Two other cases cited to us by the respondents, namely *Normart* (above) and *Leon* (above) are also of limited assistance. *Normart* (above) is authority for the proposition that personal liability may not attach to the directors of a company in a tortious action for inducing a breach of contract by said company unless the directors' actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own. As for *Leon* (above), there was a concession by the plaintiffs that none of the directors received a personal benefit which led to the court deciding that there was no oppression in an unfair prejudice claim brought by a disgruntled creditor. Factually, that case differs materially from the present appeal.

[136] It follows from the above that the following guidelines may be discerned:

(i) the language of s. 181 CA 1965 and now s. 346 CA 2016, is wide enough to encompass compensatory relief against directors and third parties in an appropriate case;

(ii) what is an appropriate case depends on the facts and circumstances of that particular case guided by the legal test enunciated in para. 128 of this judgment.

Our Answer To The Leave Questions

[137] For the reasons we have set out above, we answer question 1 in the negative. Questions 2 and 3 are answered in the affirmative. As for questions 2.1 and 3.1, suffice for us to say that it is ultimately dependent on the circumstances of a particular case. We concur with the appellant on the position in law as comprehensively and skilfully set out in Auspicious Journey's written submissions.

Application Of The Law To The Instant Appeal

[138] As the lower courts erred in their application of the relevant law relating to directors and third-party liability in an oppression claim under s. 181 CA 1965, it remains for this court to apply the legal test enunciated in para. 128 to the facts of the instant appeal. It is important to underscore that in so doing the findings of fact of the High Court as affirmed by the Court of Appeal remain untouched.

[139] The courts below have concurrently found that Hoe Leong's acts constituted oppressive conduct against Auspicious Journey and those findings are not being appealed against in the present proceedings. What is in contention is whether the Kuah brothers in their capacity as directors of Ebony Ritz and the other two third parties ought to be made personally liable for their oppressive, detrimental and/or prejudicial conduct *vis a vis* the minority shareholder, Auspicious Journey.

[140] While s. 181 CA 1965 (now s. 346 CA 2016) permits the imposition of personal liability on directors and/or third parties, such imposition of liability must be fair and just in accordance with the facts and circumstances of the case. The legal test outlined in para. 128 is applicable to ascertain whether liability in the instant appeal ought to be extended to the Kuah brothers.

[141] In applying the test as set out in para. 128 above, the following facts are relevant:

(i) The High Court Judge made clear findings of oppression on the part of the majority shareholder through the acts of the directors of Ebony Ritz namely the Kuah brothers. These acts as set out in the originating summons included the following:

(ii) The expropriation of Ebony Ritz's 2% call option which caused loss to Ebony Ritz. This amounted to oppressive conduct on the part of Hoe Leong, the majority shareholder, as well as the directors of Ebony Ritz, the Kuah brothers, as Andy Kuek was unaware of such expropriation until much later;

(iii) The expropriation of the minority shareholder, Auspicious Journey's own 49% call option by the majority shareholder, Hoe Leong and its nominee, through the acts of the Kuah brothers in their capacity as directors of Ebony Ritz. This was prejudicial and caused injury and loss to Auspicious Journey;

(iv) In order to achieve such expropriation, the majority shareholder, Hoe Leong and the Kuah brothers as directors of Ebony Ritz had wrongfully waived Ebony's Ritz's entitlements under the profit shortfall guarantee and Ebony Ritz's 2% call option;

(v) Hoe Leong and the Kuah brothers as directors of Ebony Ritz had caused the latter to furnish an indemnity to keep Sumatec indemnified in the event any claims were made against Sumatec. There was also a reassignment of dividends previously payable to Ebony Ritz such that all previous conditions were waived, without the minority shareholder's knowledge or consent. This caused detriment to Ebony Ritz and to Auspicious Journey as a minority shareholder as it had been wrongly kept out of the management of the company.

(vi) As against this both, the courts below recognised that what the Kuah brothers and Hoe Leong had effected was a salvage and warehousing arrangement, in the best interests of Ebony Ritz. The High Court Judge put it this way: "63. It must be emphasised that based on the evidence adduced by the parties, it was clear that the directors breached the respective contracts in the best interest of the company in its investment in Semua International."

(vii) The Court of Appeal similarly held: "… [39] What Geok Khim and Geok Lin did as found by the learned judge above was not in relation to Hoe Leong. Instead the decision of Hoe Leong through these nominated directors was in the best interest of Ebony Ritz …" The basis for this finding is the background factual matrix which disclosed that Auspicious Journey did not want to extend any further monies for the joint venture and even expressly refused to do so when it was sought. This is to be contrasted with the conduct of Hoe Leong in injecting no less than RM38 million into Semua International in order to enable it to keep afloat. It is an unavoidable inference that Auspicious Journey did not wish to throw good money after bad, in the sense that it was not prepared to come up with the requisite funds to purchase either its share of the 2% call option available to Ebony

Ritz, far less the 49% call option in its own favour. The latter particularly would have required a considerable capital investment which it refused to make. While it is contended by Auspicious Journey that these matters *ex post facto*, and do not detract from the oppressive conduct of the directors, the applicability of the 'fair and just' test, requires all these matters to be taken into consideration in determining whether or not liability ought to be visited personally upon the directors.

(viii) It follows from the foregoing that the acts of the majority shareholder and its nominated directors in Ebony Ritz were directed towards a salvage and warehousing situation as Auspicious Journey did not wish to expend further monies to effect such salvage of Ebony Ritz's investment. While the acts themselves and the manner in which they were carried out may be categorised as prejudicial and detrimental to the minority shareholder Auspicious Journey, it remains an inexorable reality that the conduct was ultimately related to salvaging Ebony Ritz. This weighs in favour of a non-attribution of liability as the court is bound to consider what is 'fair and just' in all the circumstances of the case.

(ix) Taking into account therefore, the entirety of the circumstances as set out above, I am of the view that the High Court and the Court of Appeal concluded correctly that liability ought not be visited upon the directors or third parties.

[142] As such, the preponderance of factors militates against holding the Kuah brothers, and a *fortiori* Teh, personally liable for their oppressive conduct.

Remedies – Should A Buy-out Have Been Ordered Rather Than Winding Up?

[143] One final issue remains to be dealt with. Auspicious Journey has, at all times, sought a buy-out order and strongly opposed relief in the form of a winding-up order. However, both the High Court and Court of Appeal refused to grant the buy-out order sought by Auspicious Journey in its originating summons. In this appeal too, Auspicious Journey sought to revisit this issue, maintaining that both the courts below had erred in ordering a winding up of Ebony Ritz instead. It is to be noted that no leave was granted on this issue. Notwithstanding this, substantive submissions were made by both parties on this issue during the hearing of the appeal. For that reason, we now set out and consider this aspect of the appeal.

[144] Auspicious Journey submits that the winding-up order granted by the High Court did not remedy the matters complained of as:

(i) Hoe Leong was able to leverage on its majority shareholder status to vote in favour of the proposed appointment of its nominated private liquidator during a contributories' meeting, an application that has since been stayed pending disposal of the present appeal.

(ii) it does not deal with Ebony Ritz's losses including the expropriation of the Ebony Ritz 2% call option, the indemnity given by Ebony Ritz, the unlawful relinquishment of the RM27 million profit shortfall guarantee and the obligation as regards payment of dividends.

[145] Auspicious Journey therefore contends that a buy-out order was and remains the most suitable relief to be awarded to it for the following reasons:

(i) Although the relationship between Hoe Leong and Auspicious Journey has broken down, this does not mean that Ebony Ritz is a failed investment or business as it remained a going concern;

(ii) Even if Ebony Ritz is a failure, this is the direct result of the oppressive conduct and actions of the Kuah brothers and their nominee third parties;

(iii) The court ought to disregard the fact that the MSO requires any company involved in the oil tanker industry to be a majority-Malaysian company and if a buy-out were granted, Ebony Ritz would be unable to continue carrying out business. Auspicious Journey takes the position that Ebony Ritz is only an investment holding company and its asset, Semua International has subsidiaries to carry on business without infringing the provisions of the MSO. Alternatively, shares may be placed in a warehousing arrangement or with "Malaysian Friendly Parties";

(iv) Auspicious Journey also contends that in the event Ebony Ritz is found to be in breach of the MSO and their licence (if any) is in danger of being revoked, Hoe Leong may submit in mitigation that they acted under court compulsion.

[146] The respondents submit that Auspicious Journey is not entitled to contest the winding-up order made by the courts below because in granting their leave application, this court dismissed all the questions in relation to whether winding-up was a remedy of last resort or what were legitimate considerations for the courts to refuse to grant Auspicious Journey the remedy of a buy-out. The respondents argue that this is an attempt to reintroduce the buy-out issue *via* the backdoor. They maintain that both the courts below were correct in concluding that winding up was the most appropriate remedy on the factual matrix of this appeal.

[147] In opposing the buy-out sought by Auspicious Journey, the respondents submit that the courts below were correct in holding that it was not a suitable remedy because:

(i) Auspicious Journey would be unjustly enriched by a buy-out and be permitted to divest itself of a bad bargain;

(ii) Semua International had difficulties sustaining its cash flow and the Semua Group had faced financial problems since 2011. In 2012, the Semua Group's total liability was RM472 million;

(iii) Hoe Leong injected RM50 million into Semua International while Auspicious Journey did not make any corresponding contributions. Instead, its director Kuek Kian Joo took proceedings against Semua International through his company Grand Columbia Holdings Sdn Bhd;

(iv) Ebony Ritz was wound up on 3 August 2016 and has had no business activities since.

Our Decision

[148] The position in law in this jurisdiction is clear and much the same as other common law jurisdictions such as Singapore and the United Kingdom. Section 181(2) CA 1965 (now s. 346(2) CA 2016) stipulates that the court "may make such order as the court thinks fit with the view to bringing an end or remedying the matters complained of". The court is not restricted to the reliefs mentioned in s. 181(2) (now s. 346(2)) but is empowered to grant an open-ended range of remedies: *Kejutan* (above). This discretion includes the discretion to refuse reliefs which the court feels inappropriate on the facts of the case: Loh Siew Cheang, *Corporate Powers Accountability*, 3rd edn. (Malaysia, LexisNexis, 2018) at 637, citing *Antoniades v. Wong & Ors* [1997] 2 BCLC 419 at 427 and *Re Jayflex Construction Ltd* [2004] 2 BCLC 145 at 161. This court recognised in *Koh Jui Hiong v. Ki Tak Sang* (above) that an order of a compensatory nature could be made in a petition under s. 346 of the Act if the order was made with the view to bringing an end to, or to remedy, matters rightly complained of under s. 346.

[149] It is true that winding up is considered an "extreme" and "drastic" remedy for oppression, per Lord Wilberforce in the cases of *Cumberland Holdings Ltd v. Washington H Soul Pattinson & Co Ltd* (1977) 2 ACLR 307 at 312 and *Re Kong Thai* (above) at 233, respectively. The Court of Appeal in Singapore in *Kuah Kok Kim v. Chong Lee Leong Co (Pte) Ltd* [1991] 1 SLR(R) 795 at [7] held that the court has an unfettered discretion which ought not to be limited or restricted by a general rule.

[150] It is clear that the remedial discretion under s. 181(2) (now s. 346(2)), given its wide wording, would depend on the circumstances of the case. Thus, although there may be other remedies available, the court may consider winding up to be more appropriate. However, in considering whether to grant such a remedy, the court would bear in mind the "drastic" character of winding up.

[151] A court determining an oppression claim is not bound by the reliefs the petitioner prefers or insists on, but is at liberty to fashion the remedy in accordance with the factual matrix of the case. See *Low Peng Boon v. Low Janie* [1999] 1 SLR 337, *Gee Hoe Chan Trading Co Pte Ltd Re* [1992] 1 CLJ 268; [1992] 4 CLJ (Rep) 383; [1991] 3 MLJ 137 and *Lim Swee Khiang v. Borden Co (Pte) Ltd* [2006] 4 SLR(R) 745. The remedy granted would depend on the complaint and the circumstances prevailing at the time of the hearing, not at the start of the proceedings; see *Re Via Servis Ltd; Skala v. Via Servis Ltd* [2014] All ER (D) 180 at [80] and *Re Hailey Group Ltd* [1993] BCLC 459 at 473.

[152] The courts have ordered a winding up where there is a deadlock between the parties such that the business cannot effectively continue. This signifies a breakdown in the relationship between the parties which is the case here. Coupled with the potential statutory contravention and Ebony Ritz's insolvent state, winding up is justified.

[153] In asking for a buy-out of its shareholding in Ebony Ritz, it appears that Auspicious Journey is seeking, in effect, to escape from a bad bargain, or to recoup its investment in the joint-venture with Hoe Leong. The risk factor ancillary to an investment cannot be ignored. There is always a risk that an investment may not pan out in the way it was intended. In our view, ordering a share buy-out would be tantamount to insulating Auspicious Journey from the risk that their capital was subject to. This is certainly not what s. 346 was meant to protect against.

[154] Of considerable significance is the fact that this court cannot and will not unnecessarily interfere with the exercise of judicial power by the trial court, which was affirmed by the Court of Appeal. In this context, it is relevant that the High Court determined that winding up was the most appropriate relief for sound reasons. The trial judge considered that a buy-out would mean that Ebony Ritz could not carry on its business of the chartering of oil tankers as it would be in breach of the MSO. The MSO requires any company involved in the oil tanker industry to be a majority Malaysian company. It could not be said that Semua International was in compliance with the MSO if Ebony Ritz was a wholly-owned Singaporean entity. This went to the substratum of the basis on which Ebony Ritz was incorporated.

[155] Secondly, the trial judge reasoned that as Ebony Ritz was a failed joint-venture and insolvent, a buy-out would not yield a fair price. There was also considerable disagreement on valuation, both in terms of the basis and the valuer, which was an ancillary consideration as to why the court refused a buy-out.

[156] The Court of Appeal considered this issue of the appropriate remedy comprehensively. The position in law in relation to s. 181(2) CA 1965 (now 376(2) CA 2016) was considered in detail and I do not propose to repeat the detailed analysis made there. Suffice to say that it is, with respect, entirely reflective of the correct position in law. (See the Singapore decision of *Kumagai Gumi Co Ltd v. Zenecon Pte Ltd* [1995] 2 SLR(R) 304 at [71] cited by this court in *Koh Jui Hiong v. Ki Tak Sang* (above)).

[157] Having considered the law exhaustively, the Court of Appeal agreed with the reasoning of the trial judge that on a consideration of the totality of the facts, the remedy of a buy-out was not the most appropriate remedy. The trial judge had not erred in the exercise of her discretion in determining that winding up was the correct remedy.

[158] It is clear that both the trial judge and the Court of Appeal were, with respect, correct in their exposition of the law as well as their analysis of the most appropriate remedy for oppression. Even though a buy-out may well be the most practical and efficacious solution in many cases of oppression, this does not mean that winding up is effectively precluded or the remedy of the very last resort. The somewhat unique facts of the instant appeal, namely the need for compliance with the MSO, the fact that Ebony Ritz is insolvent and the clear breakdown in the relationship of the parties are key *indicia* that have to be taken into consideration. Both courts below undertook a compendious consideration of these factors before concluding on the appropriate remedy. It cannot be said that the trial judge or the Court of Appeal erred in their consideration of the relevant factors nor of their conclusion. It cannot also be said that the exercise of their powers to award the remedy of winding up was perverse. In the circumstances, we do not propose to interfere with the exercise of judicial powers of the trial judge under s. 181(2) CA 1965.

Loss

[159] One other point remains to be made. The reflective loss principle dictates that a personal claim may only be brought by a member against the directors of a company where he can demonstrate 1) a breach of duty owed to him personally and 2) personal loss separate and distinct from that suffered by the company. Thus, no action lies at the suit of a member suing in that capacity to make good a diminution in the value of his shareholding, where it is merely a reflection of the loss suffered by the company: *Johnson v. Gore-Wood & Co* [2002] 2 AC 1 HL at 35, *Koh Jui Hiong v. Ki Tak Sang* (above), *Mak Siew Wei v. Yeoh Eng Kong & Other Appeals* [2019] 7 CLJ 470.

[160] In the present appeal, many of the losses claimed by Auspicious Journey did not have a direct and personal impact on it in its capacity as minority shareholder of Ebony Ritz. In fact, in most instances, the losses claimed are, in actuality, losses suffered by Ebony Ritz. While the fact of the occurrence of the events giving rise to the losses are relevant for the purposes

of establishing oppression, detriment or prejudice, this does not translate into actual loss suffered by Auspicious Journey. In assessing damages in relation to Auspicious Journey's loss, this issue has to be borne in mind.

Conclusion

[161] In summary, on the primary legal issue before this court, namely whether liability can devolve upon directors and third parties in an oppression action under s. 181 CA 1965 (now s. 346 CA 2016) we concur with the appellant that such liability can, in an appropriate case, be imposed on directors and third parties. However on the facts of the instant appeal, for the reasons we have stated, liability is not visited on the directors, the Kuah brothers.

[162] To that extent, both the trial court and the Court of Appeal erred in law in concluding that no such liability could be imposed under the statutory oppression regime as provided under the previous CA 1965 and the present CA 2016. However, it was concluded that this was not a just and fit case on its specific factual matrix to justify the extension of liability to the directors or third parties.

[163] We also concluded that the courts below did not err in awarding the remedy of winding up, rather than a buy-out in favour of Auspicious Journey, on the factual matrix of this appeal. Therefore, the appeal is dismissed. It is ordered that the matter be remitted to the High Court for damages to be assessed by the High Court Judge in favour of Auspicious Journey.

[164] My learned sister and brother judges have read this judgment in draft and concur with the same. No order as to costs.

Endnotes:

1. Section 994 of the English Companies Act 2006 provides as follows:

> 994 Petition by company member
>
> (1) A member of a company may apply to the court by petition for an order under this Part on the ground:
>
> (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or
>
> (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

(1A) For the purposes of subsection (1)(a), a removal of the company's auditor from office:

(a) on grounds of divergence of opinions on accounting treatments or audit procedures, or

(b) on any other improper grounds,

shall be treated as being unfairly prejudicial to the interests of some part of the company's members.

(2) The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as they apply to a member of a company.

(3) In this section, and so far as applicable for the purposes of this section in the other provisions of this Part, "company" means:

(a) a company within the meaning of this Act, or

(b) [omitted]